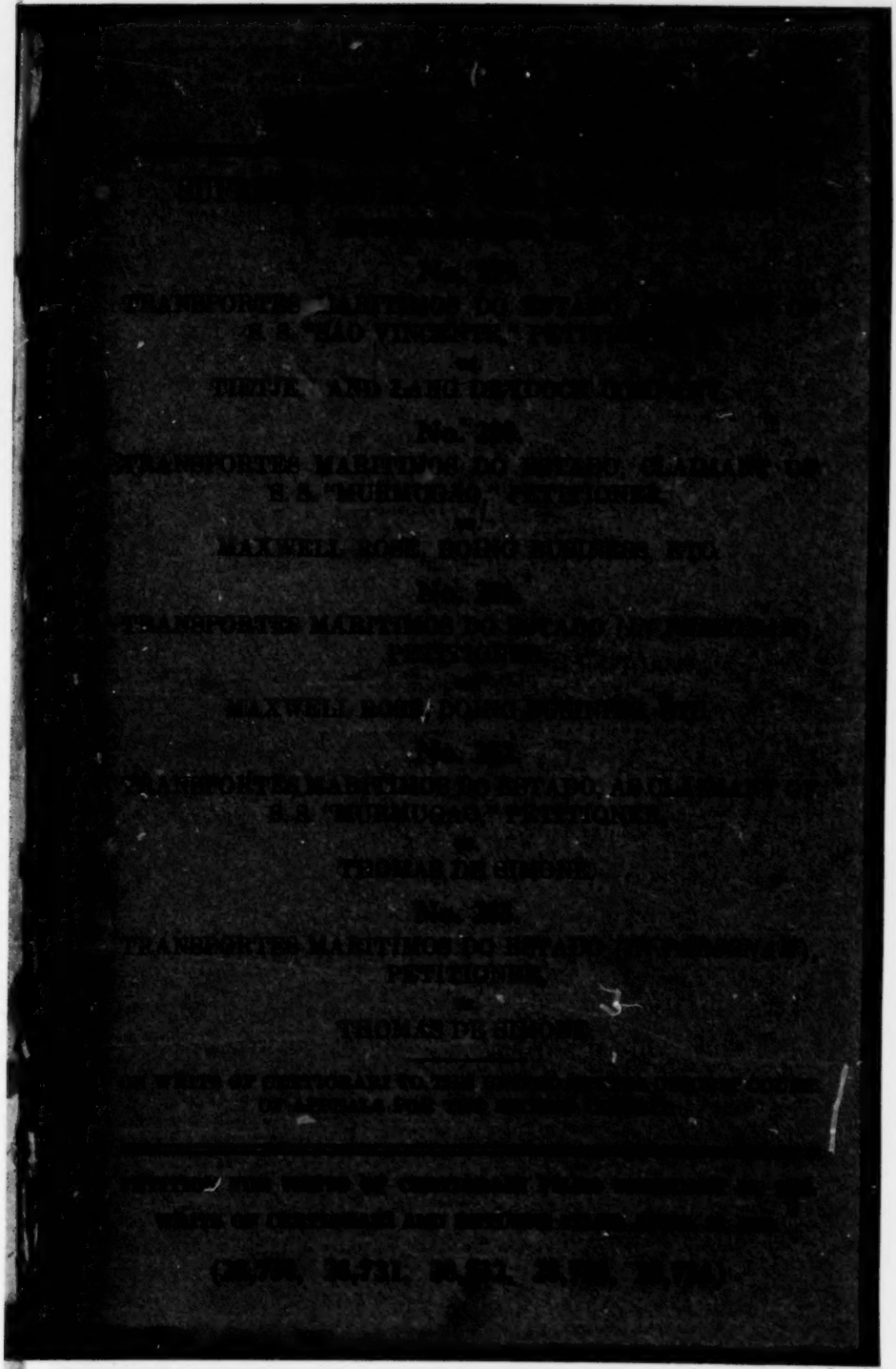

(28,730, 28,731, 28,732, 28,733, 28,734)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 279.

TRANSPORTES MARITIMOS DO ESTADO, CLAIMANT OF S. S. "SAO VINCENTE," PETITIONER,

vs.

TIETJEN AND LANG DRYDOCK COMPANY.

No. 280.

TRANSPORTES MARITIMOS DO ESTADO, CLAIMANT OF S. S. "MURMUGAO," PETITIONER,

vs.

MAXWELL ROSE, DOING BUSINESS, ETC.

No. 281.

TRANSPORTES MARITIMOS DO ESTADO (*IN PERSONAM*), PETITIONER,

vs.

MAXWELL ROSE, DOING BUSINESS, ETC.

No. 282.

TRANSPORTES MARITIMOS DO ESTADO, AS CLAIMANT OF S. S. "MURMUGAO," PETITIONER,

vs.

THOMAS DE SIMONE.

No. 283.

TRANSPORTES MARITIMOS DO ESTADO (*IN PERSONAM*), PETITIONER,

vs.

THOMAS DE SIMONE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

against

The Steamship "SAO VICENTE," Her Engines, etc., Appellant.

Statement.

Libel was filed April 14th, 1921.
Answer to Libel, May 27, 1921.
Exceptions to Answer, June 11th, 1921.
Interlocutory Decree, August 17th, 1921.
Commissioner's Report, September 27th, 1921.
Stipulation before Commissioner, September 19, 1921.
Final Decree, October 4, 1921.
Notice of Appeal and Notice of Filing, October 14, 1921.
Order of substitution of proctors for respondent, November 12, 1921.
Consent, November 10, 1921.
Claim of Owner, April 15, 1921.
Stipulation for Value, April 14, 1921.
Consent and Order of Substitution, May 27, 1921.
Opinion Sustaining Exceptions.
Order Sustaining Exceptions, August 17, 1921.
Amended Assignment of Errors, November 21, 1921.
Assignment of Errors filed October 14, 1921.
Objection to Amended Assignment of Errors.
Bond on Appeal, October 27, 1921.
Bond for Damages and Costs, October 26, 1921.

2 *Libel.*

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Tietjen & Lang Dry Dock Company against the Steamship "Sao Vicente," her engines, etc., and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime, alleges upon information and belief, as follows:

First. At all times hereinafter mentioned the libellant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, engaged in the business of ship-repairing and having its shipyard at Hoboken, New Jersey.

Second. The Steamship "Sao Vicente" is a Portuguese vessel. She now lies at Pier 2, North River, in the Port of New York, and within the jurisdiction of this Honorable Court.

Third. Between March 25th and April 14th, 1921, both inclusive, at the Port of New York, the libellant, at the instance and request of the Steamship "Sao Vicente," its officers, agents, representatives, and/or the person or persons to whom the management and control of the vessel at the Port of New York was at the said times entrusted, their agents or representatives, furnished materials and supplies and performed work, labor and services in docking and repairing the said steamship amounting in all to the sum of about Sixty-nine
3 Thousand Dollars ($69,000), which is the fair and reasonable, and in fact the agreed, value thereof. Copies of libellant's bills, dated April 12th, 1921, bearing the approval of the master, chief engineer and port engineer of the vessel are hereto annexed and marked "Schedule A."

Fourth. By reason of the premises, there became due to the libellant from the said Steamship "Sao Vicente" and her owners the sum of about $69,000, with interest thereon from April 12th, 1921, no part of which has been paid, although the same has been duly demanded.

Fifth. All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process may issue in due form of law according to the course and practice of this Honorable Court, in cases of Admiralty and maritime jurisdiction, against the said Steamship "Sao Vicente," her engines, etc., citing all persons claiming any right, title or interest therein to appear and answer upon oath all and singular the matters aforesaid, and that the said steamship "Sao Vicente" may be condemned and sold to pay the amount due this libellant with interest and costs, and that the libellant may have such other and further relief as in law and justice it may be entitled to receive.

CROWELL & ROUSE,
Proctors for Libellant.

24 Broad Street, Borough of Manhattan, New York City.

4 STATE OF NEW YORK,
County of New York, ss:

Frank X. Riordan, being duly sworn, deposes and says: I am the Assistant Treasurer of the libellant herein. I have read the foregoing libel and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true.

The sources of my information and the grounds of my belief with regard to the said matters are statements made to me by other officers and employees of the libellant.

The reason this verification is not made by the libellant is that the libellant is a corporation and incapable of making the same.

FRANK X. RIORDAN.

Sworn to before me this 14th day of April, 1921.

[SEAL.] WILLIAM H. DONNELLY.

(Notary Public Stamp.)

Answer.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of the Steamship "Sao Vicente," her engines, etc., in an alleged cause of contract, civil and maritime, brought by Tietjen & Lang Dry Dock Company, respectfully shows to this Court and alleges upon information and belief as follows:

I. Respondent denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "First" of the libel.

II. Respondent denies the truth of the allegations contained in paragraph marked "Second" of the libel, except that the Steamship "Sao Vicente" is a Portuguese vessel and that on or about the 14th day of April, 1921 (the date of the verification of the libel herein), the said vessel was at Pier 2, North River, in the Port of New York.

III. Respondent denies the truth of the allegations contained in the paragraph marked "Third" of the libel, except that it admits that between about the 25th day of March, 1921, and the 14th day of April, 1921, the libellant furnished certain materials and supplies and performed certain work, labor and services in docking and repairing the Steamship "Sao Vicente."

6 IV. Respondent denies the truth of the allegations contained in the paragraph marked "Fourth" of the libel, except that it admits that no part of the sum therein stated has been paid, although the same has been demanded.

V. Respondent denies the truth of the allegations contained in paragraph marked "Fifth" of the libel.

Further answering the libel and as a separate, distinct and complete defense to the alleged cause of action herein, respondent alleges upon information and belief:

VI. That the Steamship "Sao Vicente" is a Portuguese vessel flying the flag of Portugal, owned and operated by Transportes Maritimos do Estado, which is now and at the times mentioned in the libel was a Department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that said vessel is engaged in the public service of Portugal, and that the matters set forth in said libel relate to the management, control and operation of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants' Shipping

Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

VII. Respondent objects to, and protests against the assumption of jurisdiction by this Court, and alleges that it is a vessel
7 owned and operated by Transportes Maritimos do Estado, a Department of the sovereign foreign government of Portugal as aforesaid, and that it cannot be sued in any of the Courts of the United States without its consent and that this action is in substance and effect an action against the government of Portugal, and as such is not maintainable against this respondent.

Wherefore, the respondent prays that the libel herein be dismissed with costs to the respondent as against the libellant, and that the Court grant to the respondent such other and further relief as the justice of the case may require.

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Jose Rocha Prista, being duly sworn, says:

I am the Vice Consul-General for the Government of Portugal with an office in the City of New York in the Southern District of New York. The respondent, as I am informed and believe, is owned and operated by the Transportes Maritimos do Estado, a Department of the Republic of Portugal, a sovereign foreign government.
8 I have read the foregoing answer and know the contents thereof; that the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief as to the matters stated to be alleged upon information and belief are records at the Port of New York and communications received from the agents of the Steamship "Murmagoa."

The reason this verification is not made by the respondent is that the respondent is owned by the Transportes Martimos do Estado, a Department of the Republic of Portugal, and is not within the jurisdiction of the United States.

JOSE ROCHA PRISTA.

Sworn to before me this 27th day of May, 1921.
EUGENE H. MURPHY,
Notary Public, New York County, No. 258.

New York County Register's No. 2026.
Commission expires March 30, 1922.

9 *Exceptions to Answer.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

The libellant hereby excepts to the answer filed herein by the respondent on behalf of the Steamship "Sao Vicente" upon the ground that:

1. Said answer does not state facts sufficient to constitute a defense to the matters alleged in the libel; and
2. By appearing generally in the cause and answering the libel any claim of immunity and any claim that this Court has not jurisdiction over the parties to this cause has been waived.

Dated, New York, June 10th, 1921.

CROWELL & ROUSE,
Proctors for Libellant.

10 *Opinion.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

STEAMSHIP "SAO VICENTE," Her Engines, etc., Claimant.

Crowell & Rouse (E. Curtis Rouse, Advocate) for Libellant.
Frank M. Patterson (Howard C. Lake and M. Mackenzie, on the brief) for Respondent.

KNOX. *District Judge:*

Exceptions sustained—see memorandum in Rose, etc. v. Transportes Maritimos do Estado, filed this day August 1, 1921.

JNO. C. KNOX,
U. S. D. J.

11 United States District Court, Southern District of New York.

A 75—219.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

A 75—220.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

PORTUGUESE STEAMSHIP "MURMAGAO," Her Engines, etc., Respondent.

Kirlin, Woolsey, Campbell, Hickox & Keating (Robert S. Erskine, Advocate), for libellant.

Frank M. Patterson (Howard C. Lake and M. Mackenzie, with him on the brief), for Respondent.

The first of the above-mentioned suits is in personam for services rendered the steamship "Cunene," and process with clause of
12 foreign attachment has issued. Under such process the steamer "Murmagao" was seized; the second is in rem against the same "Murmagao," and appropriate process went forth thereunder and was executed.

Upon behalf of the respondent and owner and claimant of the "Murmagao" a notice of appearance was filed, which reads as follows:

Please take notice that the respondent above-named hereby appears in the above-entitled suit, and that I am retained as proctor for it herein.

Dated, December 13, 1920.

Yours, etc.,

FRANK M. PATTERSON, ETC.

In both suits the "Murmagao" was released upon her own and claimant filing a proper bond to respond to any decree that might be rendered. The bond was in the usual form and without reservation as to any lack of jurisdiction in this Court.

Some days after these proceedings respondent filed its answers, wherein it is admitted that libellant furnished certain services to the "Cunene" and "Murmagao." Proof, however, will be required to ascertain the extent and value thereof.

In the answer to each libel it is set up, by way of a separate, complete and distinct defense, that each of the vessels to
13 which libellant rendered services

is a Portuguese vessel flying the flag of Portugal, and is owned and operated by respondent, Transportes Maritimos do Estado. That the respondent is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and in accordance with the provisions of the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a department of the sovereign foreign government of Portugal and that it cannot be sued in the Courts of the United States without its consent.

Libellant in turn has excepted to the answers upon the ground (1) that they do not state facts sufficient to constitute a defense, and (2) that by appearing generally and answering the libel any claim of immunity and any claim that this Court has not jurisdiction over the parties to these causes has been waived.

KNOX, *D. J.*:

There can be no question but that respondent's appearance was general, for if a restricted appearance is intended it must be
14 accompanied by some statement to that effect. 4 Corpus Juris, 1918, and cases there cited. In this case there was no suggestion prior to the coming in of the answers to the libels that Transportes Maritimos do Estado was a governmental agency of Portugal or had any connection therewith. Respondent came into court to have its property released from arrest, and by so doing obtained that benefit; and now, having failed to suggest that any claim of the vessel's being immune would be raised, it should now, I think not be permitted to litigate the alleged sovereign character of the "Murmagao."

In view of the somewhat uncertain state of the law as to the status of government owned vessels when operated for commercial purposes, as indicated by "The Pesaro," U. S. Supreme Court, February 28, 1921, it is by no means certain that the action taken by the respondent was inadvisable. Had the "Murmagao" asserted her alleged immunity at the time of arrest, it is well within the range of possibility that opposition, entitled to judicial recognition, would have been interposed to her departure until the question of the court's jurisdiction was determined. In such event the delay to respondent might have been of a serious character.

But, be this as it may, as I view the doctrine of immunity of sovereigns from suits such as these, it is not so sacred as to require

its application unless the sovereign insists upon its immunity at the very inception of a given litigation.

15 The Supreme Court has held in Richardson, etc. v. Fagardo Sugar Co., 241 U. S. 44, that a government may waive its sovereign attributes, and I hold that in so far as the present respondent possesses any right of immunity it has waived the same.

I admit that my conclusion is not to be reconciled with that of Judge Manton in Simons v. Transportes Maritimos do Estado, decided March 16, 1921. It does seem to me, however, that so long as a distinction is recognized between general and special appearances such distinction must be given its logical effect.

Exceptions sustained.

August 1, 1921.

____ ____,
U. S. District Judge.

16 *Interlocutory Decree.*

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court Rooms Thereof, in the old Court House and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of August, 1921.

Present: Hon. John C. Knox, District Judge.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

This cause having been heard upon the pleadings and exceptions herein, and having been argued and submitted, and said exceptions having been sustained by decision of this Court, dated August 1st, 1921, it is now, on motion of Corwell & Rouse, proctors for the libellant,

Ordered, adjudged and decreed that the libellant do have and recover from the claimant herein the amount found to be due, as claimed in the libel, and it is further,

Ordered that it be referred to Ben A. Matthews, Esq., as Special Commissioner, to ascertain and compute the amount due the

17 libellant in the premises, and to report the same to this Court with all convenient speed.

JNO. C. KNOX,
U. S. D. J.

Notice of settlement of the foregoing decree is hereby waived.
Dated, August 17th, 1921.

CROWELL & ROUSE,
Proctors for Libellant.
FRANK M. PATTERSON,
Proctors for Claimant.

18 *Notice of Report of Commissioner.*

United States District Court, Southern District of New York.

No. 78-227.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

SIR:

Please take notice that the report of the Special Commissioner, copy of which is hereto attached, was duty filed herein this 27th day of September, 1921.

Yours, etc.,

CROWELL & ROUSE,
Proctors for Libellant.

24 Broad Street, New York City.

To Frank M. Patterson, Esq., Proctor for Claimant, 30 Pine Street, New York City.

19 *Report of Commissioner.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

To the Honorable the District Court of the United States for the Southern District of New York:

I, Ben A. Matthews, to whom by order herein dated August 17, 1921, it was referred as Special Commissioner to ascertain and compute the amount due the libellant in the premises and to report the same to this Court with all convenient speed, do hereby report as follows:

That I was on September 7, 1921 attended by the proctor for the libellant and its witnesses in support of the claim alleged in the libel herein and by the proctor for the claimant. That upon application of the proctor for the claimant, the taking of testimony was adjourned to September 15, 1921, and on that date I was advised by the proctors for libellant and claimant that they were practically agreed upon the amount of damages and would probably later file a stipulation on the subject with me.

20 On September 19, 1921, a stipulation was agreed to by the respective proctors and on September 26, 1921, was filed with me. This stipulation is annexed hereto and reads:

"The damages of the libellant herein having been fixed by mutual agreement at the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69), it is hereby stipulated and agreed by and between the proctors for the respective parties herein that the Commissioner, appointed by the interlocutory decree entered herein on August 17th, 1921, for the purpose of ascertaining and computing the amount due to the libellant in the premises, may find and report, without the taking of further testimony, the amount due the libellant to be the sum of $67,955.69, with interest thereon from April 12th, 1921.

Dated, New York, September 19th, 1921."

I therefore find and report that the amount due the libellant in the premises to be the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69) with interest thereon from April 12, 1921.

All of which is respectfully submitted.

BEN A. MATTHEWS,
Special Commissioner.

Dated, September 26, 1921.

21 *Stipulation Before Commissioner as to Amount of Damages.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc.

The damages of the libellant herein having been fixed by mutual agreement at the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69), it is hereby stipulated and agreed by and between the proctors for the respective parties herein that the Commissioner, appointed by the interlocutory decree entered herein on August 17th, 1921, for the purpose of ascertaining and computing the amount due to the libellant in the premises, may find and report, without the taking of further testimony, the amount due the libellant to be the sum of $67,955.69, with interest thereon from April 12th, 1921.

Dated, New York, September 19th, 1921.

CROWELL & ROUSE,
Proctors for Libellant.
FRANK M. PATTERSON,
Proctor for Claimant.

22 *Final Decree.*

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court Rooms thereof, in the old Post Office Building and Federal Court House, in the Borough of Manhattan, City of New York, on the 4th day of October, 1921.

Present: Hon. J. M. Mayer, District Judge.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc.; TRANSPORTES MARITIMOS DO ESTADO, Claimant.

An interlocutory decree having been entered herein on August 17th, 1921, whereby it was referred to Ben A. Matthews, Esq., as Special Commissioner, to ascertain and report to this Court the amount due the libellant herein by reason of the matters alleged in the libel, and said Commissioner having on or about September 27th, 1921, filed his report herein, awarding to libellant the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69), with interest thereon from April 12th, 1921, and the time to file exceptions having expired, and no exceptions having been filed, now, after reading said report and due
23 deliberation having been had, libellant's costs having been taxed in the sum of One Hundred and Thirty-four and 5/100 Dollars ($134.05); it is, by the Court;

Ordered that the report of the Special Commissioner herein be and it hereby is in all respects confirmed; and it is further;

Ordered, adjudged and decreed that the libellant have and recover from the Steamship "Sao Vicente," her claimant and stipulators the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69), with interest thereon from April 12th, 1921, to the date of this decree, being the sum of One Thousand Nine Hundred and Forty-eight and 06/100 Dollars ($1,948.06), together with its costs, as taxed in the sum of One Hundred and Thirty-four and 05/100 Dollars ($134.05), amounting in all to the sum of Seventy Thousand Thirty-seven and 80/100 Dollars ($70,037.80), with interest thereon until paid, and that the Steamship "Sao Vicente" be condemned therefor; and it is further;

Ordered, that, unless this decree be satisfied or an appeal taken therefrom, within ten (10) days after service of notice of entry thereof on the claimant or its proctors, the stipulators on the claimant's stipulations for costs and value cause the engagement of their stipulations to be performed, or show cause within four (4) days or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

J. M. MAYER,
U. S. D. J.

24 *Notice of Appeal.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

SIR:

Please take notice that the Steamship "Sao Vicente," claimant in the above entitled action, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from a final decree of this Court, filed and entered on the 4th day of October, 1921, and from each and every part thereof, and also from the interlocutory decree sustaining exceptions, filed and entered in said Clerk's Office on the 17th day of August, 1921, and from each and every part of said interlocutory decree.

Dated, New York, October 14, 1921.

Your, etc.,

FRANK M. PATTERSON,
Proctor for Claimant.

30 Pine Street, Borough of Manhattan, City of New York.

To Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court, Southern District of New York; Messrs. Crowell & Rouse, Proctors for Libellant.

25 *Order of Substitution of Attorneys.*

At a Term of the District Court held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 12th day of November, 1921.

Present: Hon. Learned Hand, District Judge.

TIETJEN & LANG DRY DOCK CO., Libellant,

against

Steamship "SAO VICENTE," Respondent.

Upon reading and filing the annexed consent of Frank M. Patterson and of George S. Duarte, Consul General of Portugal in the State of New York as the lawful representative of the owners of the above named steamship "Sao Vicente," the respondents herein, who reside and have their place of business in the Republic of Portugal, and on motion of F. Dudley Kohler, it is hereby

Ordered that F. Dudley Kohler of No. 25 Broadway, Borough of Manhattan, City of New York, be and he hereby is substituted in place of Frank M. Patterson, as proctor for the respondents in the above entitled action.

Enter,

L. HAND,
United States District Judge.

26 *Consent.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK CO., Libellant,

against

Steamship "SAO VICENTE," Respondent.

It is hereby consented that F. Dudley Kohler of 25 Broadway, Borough of Manhattan, City of New York, be substituted in the place and stead of Frank M. Patterson, as proctor for the respondents in the above entitled action, and that an order to that effect may be entered without further notice.

Dated, New York, November 10th, 1921.

FRANK M. PATTERSON,
Proctor for Respondents.
GEORGE S. DUARTE,
Consul General of Portugal.

STATE OF NEW YORK,
County of New York, ss:

On this 10th day of November, 1921, before me personally came the above named George S. Duarte to me known and known to me to be the person described in and who executed the foregoing
27 consent and he thereupon acknowledged to me that he executed the same, and that he is the Consul General of Portugal.

[SEAL.] ROSE ALEXANDER,
Notary Public, New York County.

New York County Clerk's No. 213.
New York Register's No. 3171.
Commission expires March 30th, 1923.

Claim of Owner.

District Court of the United States for the Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libelant,

against

Steamship "SAO VICENTE," Her Engines, etc.

And now, Transportes Maritimos do Estado, owner of the Steamship "Sao Vicente," etc., intervening for its interest in the said Steamship "Sao Vicente," etc., appears before this Honorable Court and makes claim to the said steamship, &c., as the same are under attachment in this Court, at the instance of Tietjen & Lang Dry Dock Company; and the said Transportes Maritimos do
28 Estado avers that it was in possession of the said Steamship "Sao Vicente" at the time of the issuing of process herein and that it is the true and bona fide owner of the said Steamship "Sao Vicente;" and that no other person is the owner thereof; wherefore it prays to defend accordingly.

TRANSPORTES MARITIMOS DO ESTADO,
By C. B. RICHARDS & CO.
LEONARD W. SIMMONS,
A Partner.

Sworn to before me this 15th day of April, 1921.
WILLIAM H. WILSON, JR.,
Notary Public.

BARRY, WAINWRIGHT, THACHER & SYMMES,
Proctors for Claimant.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of April, 1921, before me personally came Leonard W. Simmons, a member of the firm of C. B. Richard & Company, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same for and on behalf of said firm, as agent for Transportes Maritimos do Estado.

WILLIAM H. WILSON, JR.,
Notary Public.

29 *Stipulation for Value.*

District Court of the United States for the Southern District of New York.

Whereas, a libel was filed on the 14th day of April, 1921, by Tietjen & Lang Dry Dock Company against Steamship "Sao Vicente" for the reason and causes in the said libel mentioned; and

Whereas, said vessel is in custody of the U. S. Marshal under process issued therein, and the claimant of said vessel has filed due claim thereto, and also stipulations for costs and value, the latter in the sum of Sixty-nine Thousand ($69,000) Dollars, the agreed value thereof, as appears from the stipulation at the foot hereof; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its surety execution for the above agreed amount, with interest thereon from this date, may issue against their goods, chattels and lands.

Now, therefore, the condition of this stipulation is such that if the claimant herein and American Surety Company of New York, of 100 Broadway, Borough of Manhattan, in the City of New York, and by occupation a Surety Company, the *stipulation* undersigned, shall abide by all orders of the Court, interlocutory or final and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with in-
30 terest, then this stipulation to be void, otherwise to remain in full force and virtue.

[L. S.] TRANSPORTES MARITIMOS DO ESTADO,
C. B. RICHARDS & CO.,
Agents,
By LEONARD W. SIMMONS,
A Partner.
AMERICAN SURETY CO. OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

[L. S.] Attest:
F. G. MERRILL,
Resident Assistant Secretary.

STATE AND COUNTY OF NEW YORK, *ss:*

On this 14th day of April, 1921, before me personally came Marshall L. Brower, known to me to be the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the annexed bond of Transportes Maritimos do Estado, as surety thereon, who being by me duly sworn, deposes and says: That he resides in the City of New York, State of New York, and that he is the Resident Vice-President of the Ameri-

can Surety Company of New York, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, and as amended March 23, 1910, allowing certain corporations to be accepted as surety bonds; that the seal affixed to the annexed bond of Transportes Maritimos do Estado is the corporate seal of
31 the American Surety Company of New York, and was thereto affixed by order and authority of the Board of Trustees of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with F. G. Merrill, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said F. G. Merrill, subscribed to said bond is in the genuine handwriting of said F. G. Merrill, and was thereto subscribed by order and authority of said Board of Trustees, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Five Million Dollars ($5,000,000).

Th value of the said — is hereby fixed for the purpose of bonding in this suit at the sum of — Dollars, and the foregoing Stipulation is approved as to form, amount and sufficiency of surety.

New York, —— —, 192-.

MARSHALL L. BROWER.

Sworn to, acknowledged before me, and subscribed this 14th day of April, 1921.

[L. S.] RICHARD T. LURMAN,
Notary Public, Kings Co., 347.

Register's No. 3000.
Certificate filed in N. Y. Co. No. 171.

32 STATE OF NEW YORK,
County of New York, ss:

On this 15th day of April, ——, personally appeared before me Leonard W. Simmons, member of the firm of C. B. Richard & Co., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same for and on behalf of said firm.

[SEAL.] WILLIAM H. WILSON, JR.,
Notary Public, Kings County.

Kings County Register's No. 244.
Certificate filed in N. Y. Co. No. 309.
New York County Register's No. —.

Commission expires March 30, 1923.

33 *Consent and Order of Substitution.*

At a Stated Term of the United States District Court for the Southern District of New York Held in the Court House, Post Office Building, Borough of Manhattan, City of New York, on the 27th Day of May, 1921.

Present: Hon. Augustus N. Hand, U. S. D. J.

TIETJEN & LANG DRY DOCK CO., Libellant,

against

Steamship "SAO VICENTE," Her Engines, etc., Respondent.

On the annexed consent and on motion of Frank M. Patterson, Esq., Proctor for the Respondent herein, it is hereby

Ordered that Frank M. Patterson be, and he hereby is substituted for and in the place of Barry, Wainwright, Thacher & Symmers, Esqs., as Proctors for the Respondent herein.

AUGUSTUS N. HAND,
U. S. D. J.

We consent to the entry of the above order.

BARRY, WAINWRIGHT, THACHER & SYMMERS.

34 *Order Sustaining Exceptions.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court Rooms thereof, in the Old Court House and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of August, 1921.

Present: Hon. John C. Knox, District Judge.

TIETJEN & LANG DRY DOCK CO., Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc.

This cause having duly come on to be heard upon the exceptions of the libellant to the answer herein, and after reading the pleadings and exceptions, and after hearing E. Curtis Rouse, Esq., of counsel for the libellant, in support of the exceptions, and Frank M. Patterson, Esq., of counsel, for the claimant, in opposition thereto, and due deliberation having been had, and the Court having rendered and filed its decision herein, it is

On motion of Crowell & Rouse, proctors for the libellant,

35 Ordered that the exceptions to Paragraphs "VI" and "VII" of the answer be and the same hereby are in all respects sustained, and it is further

Ordered that the said Paragraphs "VI" and "VII" of the answer of the claimant herein be and the same hereby are struck out.

JNO. C. KNOX,
U. S. D. J.

36 *Assignments of Error.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

Steamship "SAO VICENTE," Her Engines, etc., Claimant.

The claimant, Steamship "Sao Vicente," files the following assignment of errors in the above entitled action, setting forth the errors which it avers occurred in the disposition and decision of the above cause:

1. That the Court erred in entering an interlocutory decree for the libellant thereby depriving claimant of its defense of sovereignty in the above action.

2. That the Court erred in entering a final decree for the libellant in the above action.

FRANK M. PATTERSON,
Proctor for Claimant.

30 Pine Street, Borough of Manhattan, City of New York.

37 *Objection to Amended Assignment of Error.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

The Steamship "SAO VICENTE," Her Engines, etc.

SIRS:

The within alleged Assignments of Error is hereby returned to you for the reason that the time to serve Assignments of Error has expired and that Assignments of Error have already been filed herein, and for the further reason that no amended Assignments of Error are permitted by the rules of this Court.

CROWELL & ROUSE,
Proctors for Libellant.

24 Broad Street, Borough of Manhattan, New York City.

To F. Dudley Kohler, Esq., Proctor for Claimant, 25 Broadway, Borough of Manhattan, New York City.

38 *Amended Assignments of Error.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

The Steamship "SAO VICENTE," Her Engines, etc., Claimant.

The claimant of the Steamship "Sao Vicente," appellant herein, assigns errors to the findings, decision and decrees, of the District Court herein, in the above entitled action as follows:

1. In that it held that the answer of the claimant herein did not state facts sufficient to institute a defense to the allegations in the libel herein.

2. In that it held that by appearing in this action and answering the libel, this claimant had waived its claim to immunity to the process of this Court arising out of its Sovereignty.

3. In that it held that by appearing in this action and answering the libel, this claimant had waived any claim that this Court did not have jurisdiction herein over this claimant as a Sovereign Power, or over its Steamship "Sao Vicente," as being owned and operated by it as that Sovereign.

39 4. In that it sustained the libellant's exceptions to the claimant's answer herein and directed the entry of an interlocutory decree in favor of the libellant.

5. In that it failed to hold that the claimant as a Sovereign Power or a department of a sovereign government was immune to the process of this Court and that it did not waive any of its rights to suit immunity for itself or its property or any of its rights of sovereignty by its appearing herein or answering the libel or by any other act.

6. In that it failed to hold that this claimant could properly assert its rights to sovereignty and immunity for itself and its property, to the jurisdiction of this Court at any time during the pendency of this action.

7. In that it failed to hold that because the Steamship "Sao Vicente" was represented to be public property of the Government of the Republic of Portugal, the said steamship was not subject to attachment herein and that the attachment of the said process herein should not be executed.

8. In that it failed to hold that because the steamship "Sao Vicente" was represented to be public property of the Government of the Republic of Portugal, this Court should not and could not take jurisdiction.

9. In that the Court by directing the entry of an interlocutory decree herein deprived this claimant of its defense of Sovereignty.

40 10. In that it confirmed the report of the Special Commissioner herein.

11. In that it directed the entry of a final decree herein in favor of the libellant.

12. In that it failed to hold that the defense of sovereignty was a jurisdictional defense which could be asserted at any time and was not waived by a general appearance herein.

13. In that it deprived the claimant of its defense of sovereignty herein.

F. DUDLEY KOHLER,
Proctor for Claimant, Tranportes Maritimos do Estado.

25 Broadway, Borough of Manhattan, New York City.

41 *Bond on Appeal.*

District Court of the United States for the Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

Steamship "SAO VICENTE," Her Engines, etc., Claimant.

SIRS:

Take notice that the within is a true copy of a bond this day filed in the office of the Clerk of the United States District Court for the Southern District of New York.

Dated, New York, October 27th, 1921.

FRANK M. PATTERSON,
Proctor for Claimant.

30 Pine Street, Borough of Manhattan, City of New York.

To Messrs. Crowell & Rouse, Proctors for Libellant, 24 Broad Street, New York City.

42 *Bond for Damages and Costs.*

District Court of the United States for the Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

Steamship "SAO VICENTE," Her Engines, etc., Claimant.

Know all men by these presents, That we, Transportes Maritimos do Estado, C. B. Richard & Co., agents, claimant of the Steamship "Sao Vicente," her engines, etc., as principal, and The Aetna Casualty and Surety Company of Hartford, Connecticut, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, duly authorized to transact business in the State of New York, with an office and place of business at No. 100 William Street, City of New York, as surety, are held and firmly bound unto Tietjen & Lang Dry Dock Company above named, in the sum of Two hundred fifty ($250) Dollars, to be paid to the said Tietjen & Lang Dry Dock Company, for the payment of which well and truly to be made, we bind ourselves, and each of us, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 26th day of October, 1921.

Whereas, the above named Transportes Maritimos do Es-
43 tado, C. B. Richard & Co., agents, claimant of the Steamship "Sao Vicente," her engines, etc., has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by the Judge of the District Court of the United States, for the Southern District of New York;

Now, therefore, the condition of this obligation is such, that if the above named Transportes Maritimos do Estado, C. B. Richard & Co., agents, claimant of the steamship "Sao Vicente," her engines, etc., as principal, shall prosecute its appeal to effect and pay the costs if the appeal is not sustained, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

TRANSPORTES MARITIMOS DO ESTADO, [L. S.]
By C. B. RICHARD & CO.,
Agents.
THE AETNA CASUALTY & SURETY CO.,
By HAROLD C. MEGREW,
Resident Vice President.

Attest:
E. B. SOUTHWORTH, JR.,
Resident Assistant Secretary.

44 *Stipulation as to Record.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties for the purposes of this appeal.

Dated, New York, November 30, 1921.

F. DUDLEY KOHLER,
Attorney for Appellant.
CROWELL & ROUSE,
Attorneys for Appellee

45 *Clerk's Certificate.*

United States District Court, Southern District of New York.

TIETJEN & LANG DRY DOCK COMPANY, Libellant,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of November, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

ALEXANDER GILCHRIST, JR.,
Clerk.

[SEAL.]

46 *Notice of Motion.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

against

S. S. "SAO VICENTE," Her Engines, etc.

SIR:

Please take notice that on the 19th day of December, 1921, we shall move this Court, at a Stated Term for Motions, to be held on that day at the Court Rooms thereof, No. 435 Old Post Office Building, Borough of Manhattan, City of New York, for an order dismissing the appeal herein, or, in the alternative, for an order affirming the decree of the District Court herein, with costs and penalties, including an extra allowance because of unnecessary delays,
47 and for such other and further relief as to the Court may seem just.

Dated, New York, December 14th, 1921.

Yours, &c.,

CROWELL & ROUSE,
Proctors for Libelant-Appellee.

24 Broad Street, Borough of Manhattan, New York City.

To F. Dudley Kohler, Esq., Proctor for Claimant-Appellant, 25 Broadway, Borough of Manhattan, New York City.

48 *Affidavit of E. C. Rouse.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

against

S. S. "SAO VICENTE," Her Engines, etc.

STATE OF NEW YORK,
County of New York, ss:

E. Curtis Rouse, being duly sworn, deposes and says:

That he is one of the proctors for the libelant-appellee. That this is an appeal from a final decree in Admiralty in the District Court, Southern District of New York, in favor of the libelant for the sum of Seventy Thousand and Thirty-seven and 80/100 Dollars ($70,037.80).

The libel was filed herein on or about April 14th, 1921. The cause of action is a maritime lien for repairs rendered to the Portuguese Steamship "Sao Vicente" while in the port of New York.

The vessel was attached, and was subsequently released upon
49 the filing of a claim of owner and stipulation for value (fols. 80-95, Transcript of Record). These documents were filed on or about the 15th of April, 1921. The vessel was claimed by the Transportes Maritimos do Estado, as owner, and was executed by C. B. Richards & Company of this city as agents. No mention is made of any assertion that the owners objected to the Court taking jurisdiction of them as being foreign sovereign powers. Subsequently, during May, 1921, an answer was filed which alleged, for the first time, the defense that the vessel and its owners were immune from the process of the Admiralty Court (fol. 17). Exceptions were filed to the answer on the ground that this objection to jurisdiction was waived by the general appearance and release of the vessel upon the claim of owner and stipulation for value (fol. 26). The exceptions came on to be heard before Hon. John C. Knox, District Judge, together with similar exceptions in parallel case of Maxwell Rose vs. The Steamship "Mormugao," claimed by the same parties in the same manner. The exceptions were sustained (fols. 29 and 103). Damages were stipulated without prejudice and final decree entered.

The question therefore is whether the claim of immunity can be asserted after a general appearance and after the release and departure of the vessel had been obtained.

It is difficult to see any merit as a matter of law in the contentions raised by the appellant on this appeal, and it would appear that the appeal is frivolous and interposed for the purpose of delay.

50 The printed transcript of record was filed in the office of the Clerk of this Court on or about November 30th, 1921.

By reason of the premises, the appeal should be dismissed or the decree of the District Court should be affirmed with costs, and also the extra damages allowed in such cases of an improper appeal for purposes of delay should be sustained.

E. C. ROUSE.

Sworn to before me this 15th day of December, 1921.

[SEAL.] E. R. ELLS,
Notary Public.

51 *Affidavit of F. Dudley Kohler.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

against

S. S. "SAO VICENTE," Her Engines, etc., Claimant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

F. Dudley Kohler, being duly sworn, says, that he is the proctor for the claimant herein.

That the former proctor for the claimant filed and served a notice of appeal and notice of filing on October 14th, 1921, together with an assignment of errors, and on October 27th, 1921, a bond for costs on appeal was served with notice of filing.

That deponent was substituted by an order of the United States District Court for the Southern District of New York, on the 12th day of November, 1921, in place and stead of Frank M. Patterson, Esq., who formerly appeared in behalf of the claimant.

52 That on the 21st day of November, 1921, deponent served upon the proctors for the libellant an amended assignment of errors.

That on the 30th day of November, 1921, deponent filed and served the apostles on appeal and the proctor for the appellee stipulated in writing that the said apostles are true transcripts of the record of the said District Court in the above entitled action as agreed on by the parties for the purposes of this appeal and said proctors for the appellee accepted service of same on said day.

The affidavit of E. C. Rouse, verified the 15th day of December, 1921, in support of this motion cites the case of Maxwell Rose vs. The Steamship "Mormugao." Deponent desires to relate to the court that in this case a motion was made for the relief similar to the relief herein asked for, but said motion was denied on condition that the appellant pay into Court additional security to cover the appeal in the form of a supersedeas bond.

Deponent in this case is ready and able to file a supersedeas bond in any amount which to this Honorable Court may seem just and proper. The amount of this libel is $69,000 and interest is asked from the 12th day of April, 1921, and interest on this amount for one year would be $4,140 and deponent offers this amount as additional security.

In further regard to the affidavit in support of this motion, deponent denies that this appeal is frivolous and interposed for

53 the purpose of delay. The question of immunity of a sovereign can be suggested at any time by the sovereign whether before suit or after, and at any time during a proceeding.

The former proctor for the claimant herein apparently did not use great precaution in appearing for the release of this ship at a time which was urgent and every day of demurrage meant large sums of money to the owners. When a special notice of appearance should have been filed, the proctor for the claimant at that time appeared generally but the law seems to be that a sovereign can withdraw its consent to be sued at any time, the same as it can give its consent to be sued at any time, and the question here is whether the jurisdiction of this court cannot be raised at any time during the suit and whether a general notice of appearance precludes a sovereign from asserting his sovereign rights.

The libellant in this case had knowledge that this steamship, to which it made repairs was the property of the sovereign government of Portugal and that as a government owned ship is immune from attachment, that they gave their credit not to the steamship herein but to the government of the Republic of Portugal and the libellant

should look to the government of Portugal for payment rather than to the ship.

The bond and stipulation for costs filed by the claimant in this action was given by the American Surety Company of 100 Broadway, Borough of Manhattan, City of New York, at the request of the Consul General of Portugal and no collateral was given
54 to the American Surety Company for issuing this bond and no assurance of re-imbursement other than the signature of the Consul General. If this appeal is dismised at this time so that the claimant has not full opportunity and time to be heard on the argument of the appeal that the surety company will suffer thereby and not the government of Portugal, which is the owner of the vessel.

F. DUDLEY KOHLER.

Sworn to before me this 17th day of December, 1921.

ROSE ALEXANDER,
Notary Public, New York County.

New York County Clerk's No. 213.
New York Register's No. 3171.

Commission expires March 30th, 1923.

55 *Decision.*

This motion to dismiss is granted. The sovereign immunity can be waived and has been waived in this case.

Dec. 23, 1921.

H. W. R.
M. T. M.
J. M. M.

Filed Dec. 23, 1921.
WILLIAM PARKIN,
Clerk United States Circuit Court of Appeals for the Second Circuit.

56 *Order Dismissing Appeal.*

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 30th day of December, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry Wade Rodgers,
Hon. Martin T. Manton,
Hon. Julius M. Mayer,
Circuit Judges.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

v.

Steamship SAO VICENTE, Her Engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

A motion having been made herein by counsel for the appellee to dismiss the appeal herein;

Upon consideration thereof it is

57 Ordered, that said appeal be and hereby is dismised with costs.

Further ordered that a mandate issue accordingly.

M. T. M.
J. M. M.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Tietjen & Lang Co. v. SS Sao Vicente. Order. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 30, 1922. William Parkin, Clerk.

58 *Petition for Rehearing.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY

against

The Steamship "SAO VICENTE," Her Engines, etc., Respondent-Appellant.

Petition of the Claimant for a Rehearing; or in the Alternative that Certain Questions Present in this Case be Certified to the United States Supreme Court; and that the Issuance of the Mandate Herein be Stayed.

To the Honorable the Judges of the Circuit Court of Appeals, for the Second Circuit:

The petition of the Honorable George S. Duarte, Consul General of Portugal in the United States of America, claimant-appellant herein, respectfully shows to this Court and alleges as follows:

First. The decision of this Court filed on December 23, 1921, decides a question which we believe has never before been
59 presented to or decided by any court. This question may be summarized as follows:

It has been claimed that by appearing generally and answering the libel, the sovereign Government of Portugal has waived its claim for immunity for its vessel and itself. It is true that the usual method of claiming immunity in a case of this kind is to have a suggestion presented by the State Department of our Government through some official of the government authorized by it to present such a suggestion to the court. But nevertheless, the claim that objection to the jurisdiction of the court in this case was waived merely because this course was not followed but that instead an answer was filed and a bond given, is untenable.

Second. The answer not only explicitly did not waive but actually emphatically asserted, claimed and pleaded the lack of jurisdiction of the court. This is always a matter of defense and sufficient to sustain the answer over the exceptions thereto of the libellant.

Third. It is a well settled principle of law and of international relations, that a sovereign government cannot be sued without its consent, either in its own courts or in those of any other sovereign, nor can it be brought into a court of any government by an indirect procedure as an attack upon its own property. The principle that it is not subject to a direct suit is no exception, and there is
60 no distinction between suits against the sovereign and suits against its property. It cannot be forced to submit to the jurisdiction of the court of any government by the necessity of defending its property from attack by legal process.

Fourth. If the court could not take jurisdiction over the property for the purpose of the suit even though there were not a defect in the service of the process or in the process itself, the court could not deprive the sovereign of its right to object to its jurisdiction merely because it had appeared. Objection to irregularities may be waived by appearance and answer but objections to the right of the court to entertain suit are not so waived. That is, as is well known, a general appearance does not waive any objection a party may have to the jurisdiction of the subject matter of the action. In the instant case there is really no question as to the regularity of the process or its service. If the Transportes Maritimos do Estado were a private person and not a bureau or branch of the Portuguese Government, or the Steamship "Sao Vicente" private property, the attachment undoubtedly would have been regular. But the Transportes Maritimos do Estado is a sovereign, and the vessel is sovereign property. The subject of the action is sovereign property. The disposition of sovereign property, the rights of the sovereign over its property and the determination of questions concerning a sovereign and its property this court has no jurisdiction. When the question
61 of jurisdiction is one pertaining thus to the subject of the controversy, an appearance or the filing of an answer will not

confer jurisdiction, but in fact, the court may at any time of its own motion, interpose the objection of its want of jurisdiction.

Fifth. Wherever a sovereign does permit itself to be sued in any court, by individuals or other states, this permission is altogether voluntary on the part of the sovereign and it may prescribe the terms and conditions on which it consents to be sued and may withdraw its consent at will.

South & North Alabama Railroad Co. v. Alabama, 101 U. S., 832;

Beers vs. Arkansas, 61 U. S. (20 How.), 527.

In Beers v. Arkansas, supra, Chief Justice Taney said:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission, but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it fol-
62 lows that it may prescribe the times and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it * * *. Nor can this court inquire whether the law (withdrawing its consent) operated *hardly* or unjustly upon the parties whose suits were then pending. * * * The legislature * * * might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so."

If it may so withdraw its consent at any time it is impossible to conceive how the sovereign can be bound by an implied waiver, as claimed by the libellants in this case.

Sixth. It is evident, therefore, that there can be no waiver of jurisdiction against a foreign sovereign as attempted in the instant case, except by its express consent to submit itself to that jurisdiction. There can be no such waiver by implication; sovereigns are equal. It is the duty of a sovereign not to submit his rights to the submission of another sovereign. He is the sole arbitrator of his own rights and acknowledges no superior. There is no law nor any practical consideration by the executive, the legislative or judicial department of our Government which authorizes its jurisdiction herein claimed.

Recourse can only be had to the law of nations to determine
63 the equity of such a claim. The Law of Nations excludes the implication and presumption to submit to such jurisdiction in every case where a foreign sovereign is concerned. There is no assent by a foreign sovereign to this jurisdiction over his prerogative. There may be a distinction between the private acts of a sovereign as an individual and his acts as a sovereign, and between his public property and property owned by him in his private capacity, but in this case, it is the public property of a sovereign government which

is involved and therefore there can be no consent on its part to submit itself to the jurisdiction of our courts. A foreign sovereign government, as said by Chief Justice Marshall in "The Exchange" is not understood as intending to subject itself to a jurisdiction incompatible with its dignity or the dignity of the nation. Therefore there can be no implied waiver as the element of consent to the jurisdiction is distinctly lacking.

Seventh. Clearly it must follow that a foreign sovereign cannot be held to have waived its immunity by any of the rules of pleading enforced in our courts. The filing of an appearance and answer in this case by the representative of the sovereign government of Portugal, instead of causing a suggestion to be interposed by the United States Government was at most a mistake in practice, a mistake of proctors, officers of this court, to whom he had intrusted the conduct of the case and the interests of his sovereign. He was not familiar with our laws and the niceties of practice in our courts
64 and neither he nor his government could properly be regarded as waiving the rights of his sovereign by the error of his proctors, or as bound by their error made without his knowledge.

Eighth. As a matter of comity the United States should extend to foreign governments the immunity which the foreign government claims for itself. The United States can concede to its citizens the jurisdiction of its courts over its own property but not properly could it give such jurisdiction over the property of other sovereigns. By presenting conditions under which its own courts could take jurisdiction over the property of a foreign sovereign or under which the foreign sovereign would waive its immunity to the jurisdiction of the United States Courts, it would in fact be so conferring upon its own courts jurisdiction over the property of a foreign sovereign without the consent of the foreign sovereign. This would clearly be in violation of all the principles of sovereignty and comity.

Ninth. The fact that a bond was filed in this case as we have shown above cannot constitute a waiver of immunity. The process against the vessel is to compel an appearance, to compel the master or any one else on behalf of the ship to give security is merely to bring a sovereign into court and to subject him in his sovereign character to the jurisdiction of the court; in other words, to con-
65 strue this appearance and answer wherein it specifically denied this jurisdiction of our courts and asserted and claimed its immunity would be to compel it to waive its sovereignty, and it needs no argument to show that a compulsory waiver of this kind is no waiver at all. In the case of the Steamship "Luigi," there was a claim of owner and a bond filed, and the court did not suggest a waiver of jurisdiction but allowed the attachment to stand only on the ground that private owners had intervened, and that, therefore, the rights of the foreign sovereign, which did not own but only held the ship under requisition or charter, could no longer be affected.

Tenth. Although we have shown that there can be no waiver on the part of the sovereign government by implication, and certainly only by its express and intentional consent, we can go further and show that there was certainly no waiver of this claim to immunity, for the answer specifically sets up this claim and right of the Sovereign Government of Portugal to the immunity for itself as a sovereign and for the "Sao Vicente" as the public property of a sovereign. In the face of this distinct pleading of its right to immunity as a sovereign, it is not conceivable that it can be held as consenting either impliedly or expressly to waive these rights. A defendant who pleads want of jurisdiction in the first instance does not waive such plea by pleading in the same answer other defenses not inconsistent therewith.

66 Eleventh. There have been no decisions which have held that by appearing and answering in an action brought against it directly that is, in which the effort was made to bring it into court originally as a party, the sovereign waived its claim of immunity as a sovereign. The few cases which seem to uphold this theory of waiver are cases in which the sovereign after the inception of the suit intervened and expressly asked to be permitted to come into the suit as a party. The law has been consistently against this theory of waiver by a sovereign asserted in this case.

Kingdom of Roumania vs. Guaranty Trust Co., 250 Fed., 341;
The "Luigi," 230 Fed., 493;
Porto Rico vs. Ranuo, 232 U. S., 627;
Porto Rico vs. Rosaly, 227 U. S., 270;
Kawananakoa vs. Polyblank, 205 U. S., 349;
Smith vs. Reeves, 178 U. S., 436.

In the Kingdom of Roumania vs. Guaranty Trust Co., supra, the sovereign itself instituted an action in the District Court for the Southern District of New York to recover the balance of a deposit alleged to have been made by it. One Morris Arditte, claimed that this sovereign had made a contract with him for shoes for its army and had obliged him to make a deposit as a guaranty of his performance of the contract, and that the amount thereof had come into the possession of the Guaranty Trust Co., and he alleged a
67 claim against the Kingdom of Roumania for breach of the contract and the return of his deposit. The Trust Company sought to have Arditte substituted for it as defendant in the action of the Kingdom of Roumania against it and the District Court made such an order in the theory that by coming into our courts by bringing the action against the Trust Company the sovereign had waived its immunity, and that therefore, the Trust Company could bring in this claimant against the sovereign as defendant in its place. On appeal, the Circuit Court held that even by coming into our court in this manner the sovereign did not waive its immunity from such by a party claiming a lien on the deposit sued for as its creditor and reversed the order. In this case, Ward, C. J., said:

"It is the long accepted law that a foreign sovereign cannot be sued nor his property attached in the courts of a foreign friendly country without his consent. Nor can the defendant when sued by a foreign sovereign avail himself of any counterclaim or set off except perhaps a set off arising out of the same transaction. Under no circumstances can he obtain an affirmative judgment."

In this case even by directly invoking the jurisdiction of our courts, it was held that the sovereign did not waive his immunity from its jurisdiction to the extent of subjecting itself to the possibility of an affirmative judgment against it even in favor of the de-
68 fendant which it sued. How, therefore, can it possibly be claimed that by pleading to a libel against it and thereby directly asserting and claiming its immunity, it waived its immunity as a sovereign from an affirmative judgment or decree against it in a favor of the libellants in the case at bar.

In Kawananakoa v. Polyblank, 205 U. S., 349, Justice Holmes said:

"The Territory of course could waive its exemption, Smith v. Reeves, 178 U. S., 436, and it took no objection to the proceedings in the case cited if it could have done so. See Act of April 30, 1900, C. 339, #96; 31 Stat. 141, 160. But in the case at bar it did object, and the question raised is whether the plaintiffs were bound to yield. Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, C. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. 'Car on pent bien recevoir loy d'autruy mais il est impossible par nature de se donner loy' Bodin, Republique, 1, C 8, Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, C. 3 Nemo sua statuto ligatur
69 necessitative. Baldus, De Leg. et Const., Digna Vox (2d ed., 1496, fol. 51 b. Ed. 1539, fol. 61).

In Porto Rico v. Ranoas, 232 U. S., 627, the Attorney General of Porto Rico asked leave to intervene and be made a party defendant. The court granted the motion. The people of Porto Rico demurred to the amended complaint on the ground that being a sovereign it was immune from suit at the instance of private individuals and the court held that if the suit had been originally against the people of Porto Rico it could have relied upon this immunity under Porto Rico v. Hosaly, 227 U. S., 270.

In the "Luigi," 230 Fed., 493, there was a claim of owner and a bond filed and the Court allowed the attachment to stand not on the ground of a waiver of objection to jurisdiction but only on the ground that private owners had intervened, and that therefore, the rights of the foreign sovereign which did not own, but only held the ship under requisition or charter, could no longer be affected.

In Smith v. Reeves, the action was brought in the Circuit Court of

the United States for the Northern District of California against the defendant as Treasurer of the State of California to recover a sum paid as taxes illegally assessed and collected, under Section 3669 of the Political Code of California. This section provided that an action might be in such cases brought against the State
70 Treasurer, and that at the time when the State Treasurer demurs or answers he may demand that the action be tried in the Superior Court of the County of Sacramento. The State Treasurer, represented by the Attorney General of the State, demurred to the Complaint upon various grounds affecting the merits of the case, and also moved to dismiss the case upon the ground that the Circuit Court had no jurisdiction of the defendant or of the action.

The demurrer in the Circuit Court was on the grounds: First, that the court had no jurisdiction of the subject matter of the action, and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer on the first ground and dismissed the bill on the appeal to the Circuit Court of Appeals, the latter court affirmed the order of dismissal, not upon the second ground but upon the ground that the Circuit Court had no jurisdiction because the State of California, a sovereign, had not consented to be sued in that court, and the case went to the Supreme Court, where the decision of the Circuit Court of Appeals was affirmed. There Justice Harlan said:

"The suability of a state without its consent is a thing unknown to the law. This has been so often laid down and acknowledged by courts and juries that it is hardly necessary to be formally asserted. It may be accepted as a point of departure unquestioned. * * *
The Circuit Court entertained jurisdiction of the cause and
71 dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction, but affirmed the order of dismissal on the ground of want of jurisdiction in the latter Court to take cognizance of such a case as here presented. We approve the action of the Circuit Court of Appeals and its judgment is affirmed."

Here although the sovereign had appeared and pleaded to the merits as well as the lack of jurisdiction, as in the case at bar, the United States Supreme Court dismissed the bill on the ground of the immunity of the sovereign from the jurisdiction of the court.

Thirteenth. It is clear therefore, that according to all principles of law, and also the decisions of our courts including the highest court of our country that there can be no such thing as an implied waiver by a sovereign of its immunity to the jurisdiction of our courts. There must be an unmistakable consent of the sovereign to give jurisdiction to our courts. Such consent can only be inferred from some affirmative act, in fact, invoking the jurisdiction such as by bringing a suit on its own initiative in such court or asking leave to be a party to a suit pending theerin or possibly by

pleading in a suit and making no reference or claim therein to its rights to immunity. No such consent can possibly be inferred where it is, as in this case, expressly denied and the claim to im-
72 munity is explicity insisted upon in its answer. To claim that merely by answering the libel, regardless of the contents of that answer it waives its immunity is an unwarrantable and indefensible stretching of the idea of waiver or consent and also an exerting in the first instance of a jurisdiction of our court, which it could not in law or principle claim, to compel the sovereign to an unwilling consent to its jurisdiction. Such an enforced consent it is clear is no consent, and therefore cannot properly be regarded as a waiver of the sovereign to its right to immunity. It would amount as Julge Hough said in "The Maipo," 259 Fed., 367,

"to what might become under conceivable circumstances, a casus belli."

Fourteenth. Since the sovereign power of a nation alone is competent to avenge the wrongs committed by the sovereign, a question of this character is not justiciable but solely for the Diplomatic Department of the several sovereign governments. It seems idle to endeavor to confer jurisdiction in our courts by the fiction of an implied waiver of immunity, as in the case at bar.

Fifteenth. This question is not confined to cases like the present but will arise frequently. The efforts of counsel for the libellant have not brought to light a single decision on this question in point.

Sixteenth. We believe that the fundamental question of law
73 involved was not fully and adequately argued, and that the far. reaching results of this decision were not squarely presented to this court.

Seventeenth. We therefore respectfully pray this Honorable Court:

1. That a reargument of this case be granted for the sole purpose of further arguing the question of law above set forth.

2. If upon such reargument, this court shall not be satisfied of the correctness of this claimant's position, we respectfully pray in view of the novelty and importance of the question of law stated above, that this court may see fit to certify this question to the United States Supreme Court for its determination.

We respectfully submit that the question is one which must eventually be passed upon by the Supreme Court; and it is not likely that this question will ever be presented in a case more important than the present, either from the standpoint of the amount of money involved or the number of and importance of the parties interested.

3. Pending a hearing and decision on this petition, we respectfully pray that the issuance of a mandate of this court be stayed; and in the event that this petition is denied, we respectfully pray that the

issuance of the said mandate be stayed until after this
74 petitioner shall have had an opportunity to present to the United States Supreme Court a certiorari herein, and until after a decision thereon, provided such petition is properly filed and submitted after due and timely notice to the other parties herein at the first day on which such petition can be submitted to the said Supreme Court, at the February term thereof, in the year 1922.

4. The amount of any judgment to be entered on the mandate of this court is more amply secured by the supersedeas bond filed or offered to be filed herein in the sum of $5,000, with the American Surety Company as security.

GEORGE S. DUARTE,
Consul General of Portugal.

STATE OF NEW YORK,
County of New York, ss:

George S. Duarte, being duly sworn, deposes and says that he is the duly qualified and accredited Consul General of Portugal in the United States of America, and the petitioner herein in behalf of his Government the representative of the Government of Portugal; that he has read the foregoing petition and knows the contents
75 thereof and that the same is true to the best of his knowledge, information and belief.

GEORGE S. DUARTE,
Consul General of Portugal
in the United States of America.

Sworn to before me, this 30th day of December, 1921.

MAMIE SCHMECK,
Notary Public, New York County.

New York Co. Clerk No. 400; Reg. No. 2459.
Certificate filed in Kings County.
Clerk's No. 238; Register's No. 2246.
Commission expires March 30, 1922.

I, F. Dudley Kohler, hereby certify that the foregoing petition in my opinion is true in point of fact and well founded in point of law and is not interposed for the purpose of delay.

F. DUDLEY KOHLER,
Advocate for Petitioner.

Office and Post Office Address, No. 25 Broadway, New York City.

Decision Granting Rehearing.

Endorsed.

I vote to grant.
H. W. R.
M. T. M.
J. M. M.

76 *Order.*

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit held at the Court Rooms, in the Post Office Building, in the City of New York, on the 30th day of January, one thousand nine hundred and twenty-two.

Present:

Hon. Henry Wade Rogers,
Hon. Martin T. Manton,
Hon. Julius M. Mayer,
Circuit Judges.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

v.

Steamship SAO VICENTE, Her Engines, etc.; GEORGE S. DUARTE, Claimant-Appellant.

A petition for a reargument of the motion to dismiss or affirm herein having been granted, and said motion having been re-
77 argued;

Upon consideration thereof it is

Ordered that the petition be and hereby is dismissed, and the former decision of this court affirmed.

H. W. R.
M. T. M.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Tiejen & Lang Dry Dock Co. v. SS. Sao Vicente. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1922. William Parkin, Clerk.

78 *Opinion, Mayer, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appelee,

v.

Steamship SAO VICENTE, Her Engines, etc.; TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

MAXWELL ROSE, Doing Business as Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

v.

STEAMSHIP MURMUGAO, Her Engines, etc.; TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

79 MAXWELL ROSE, Doing Business as Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

v.

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Apellant.

Before Rogers, Manton, and Mayer, Circuit Judges.

Crowell & Rouse, proctors for Tietjen & Lang, Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes Maritimos do Estado, Claimant-Appellant.
Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Maxwell Rose, etc., Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.
Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Maxwell Rose, etc., Libellant-Appellee.
80 F. Dudley Kohler, proctor for Transportes, Respondent-Appellant.

MAYER, *Circuit Judge:*

The first motion made in this group of cases was a motion on behalf of libelant-appellee in the case of Sao Vicente to dismiss the appeal.

This motion was granted and we filed a brief memorandum reading:

"This motion to dismiss is granted. The soverign immunity can be waived and has been waived in this case."

Thereafter, claimant-appellant petitioned for a rehearing, the petition was granted, a rehearing was had and the court adhered to its previous decision. It was agreed between the proctors that all the

cases should follow our decision in the Sao Vicente case. After our decision on rehearing our attention was called to the opinion of the Appellate Division of the Supreme Court for the First Department in De Simone against Transportes Maritimos do Estado and, as it was suggested that our decision was not in harmony with that of the learned Appellate Division, we concluded to point out the views entertained by us more fully than we did in our brief memorandum.

In the Sao Vicente case, the libel was brought by a New Jersey corporation engaged in the business of ship repairing and having its shipyard at Hoboken. The libel, which was verified April
81 14, 1921, alleged that between March 25th and April 14, 1921, at the port of New York, libelant, at the instance and request of the S. S. "Sao Vicente", its officers, etc., furnished materials and supplies in the form of work, labor and services in docking and repairing the steamship amounting in all to $69,000 and that no part of this amount had been paid. Libellant prayed that the usual process should issue. After the vessel had been libelled, the claim of the owner was filed in usual form. It read:

"And now, Transportes Maritimos do Estado, owner of the Steamship "Sao Vicente," etc., intervening for its interest in the said Steamship "Sao Vicente," etc., appears befor- this Honorable Court and makes claim to the said steamship, &c., as the same are under attachment in this Court * * * and the said Transportes Maritimos do Estado avers that it was in possession of the said Steamship "Sao Vicente" at the time of the issuing of process herein and that it is the true and bona fide owner of the said Steamship "Sao Vicente;" and that no other person is the owner thereof; wherefore it prays to defend accordingly.

TRANSPORTES MARITIMOS DO ESTADO,
By C. B. RICHARDS & CO.
LEONARD W. SIMMONS,
A Partner."

82 This claim was verified by Simmons and acknowledged before a notary, the acknowledgement reading, in part:

"he acknowledged to me that he executed the same for and on behalf of said firm, as agent for Transportes Maritimos do Estado."

The stipulation for value filed the same day was likewise in usual form providing in the condition clause

"if the claimant herein and American Surety Company of New York, of 100 Broadway, Borough of Manhattan, in the City of New York, and by occupation a Surety Company, the stipulation undersigned, shall abide by all orders of the Court, interlocutory or final and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with inter-

est then this stipulation to be void, otherwise to remain in full force and virtue."

TRANSPORTES MARITIMOS DO ESTADO.
C. B. RICHARDS & CO.,
Agents,
By LEONARD W. SIMMONS,
A Partner."

It is not disputed that the usual stipulation for costs was also filed. Upon filing the claim of the owner and the stipulation for value and the stipulation for costs, the owner procured the release of the
83 vessel from arrest and the vessel is no longer in these waters and hence is no longer in this jurisdiction.

It will be noted that up to this time there was not even the remotest suggestion that the vessel belonged to a foreign sovereign. On May 27, 1921, an answer was verified by Jose Rocha Prista, who swore that he was the Vice Consul-General for the Government of Portugal with an office in the City of New York and that the vessel "as I am informed and believe, is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government * * * the sources of my information and the grounds of my belief as to the matter stated to be alleged upon information and belief are records at the Port of New York and communications received from the agents of the Steamship 'Murmagoa.'

The reason this verification is not made by the respondent is that the respondent is owned by the Transportes Maritimos do Estado, a Department of the republic of Portugal, and is not within the jurisdiction of the United States."

The answer alleged inter alia.

"That the Steamship 'Sao Vicente' is a Portuguese vessel flying the flag of Portugal, owned and operated by Transportes Maritimos do Estado, which is now and at the times mentioned in the libel was a Department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied
84 with the United States * * * and that said vessel is engaged in the public service of Portugal, and that the matters set forth in said libel relate to the management, control and operation of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchant's Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

Respondent objects to, and protests against the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by Transportes Maritimos do Estado, a Department of the sovereign foreign government of Portugal as aforesaid, and that it cannot be sued in any of the Courts of the United States without its consent and that this action is in substance and effect a[illegible]tion against the government of Portugal, and as such is not maintainable against this respondent."

To this answer, libelant duly excepted, the exceptions were sustained by Judge Knox, the usual interlocutory decree was entered and later a special commissioner reported that a stipulation as to damages had been agreed to by the respective proctors and on the basis of that stipulation the special commissioner ordered that the amount due libelant was $67,955.69 with interest from April
85 12, 1921. Thereafter on October 4, 1921, a routine final decree in usual form was entered.

1. Under the Carlo Poma case, 255 U. S., 219, we think that the decree was not appealable to this court.

2. In any event, the jurisdictional question sought to be raised by the answer was not properly raised. The Vice Consul General does not assert that the foreign sovereign government owns the vessel but merely alleges that it is owned by a department of the sovereign foreign government and so far as this record discloses there is nothing in the answer to show that the ownership of the department is the ownership of the sovereign itself. Indeed, the Vice Consul General does not make any assertion on behalf of the Republic of Portugal, but merely states in his affidavit that he is informed and believes that the vessel is owned by a department of the government of the Republic of Portugal and that this information according to the Vice Consul General's affidavit was obtained not from the sovereign under whom he is serving but from some undescribed records at the Port of New York and communications from the agents of another steamship which we happen to know from the other cases is alleged to be owned by this same department.

Even if it were to be held notwithstanding The Pesaro, 255 U. S., 216, that the question of jurisdiction could be raised by the Vice Consul General, it is not properly raised upon this record.

86 3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance. In Beers v. State of Arkansas, 20 How. 527, in speaking of the consent of the State of Arkansas, the court said:

"And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

But this expression must be read in connection with the particular facts of that case, as is illustrated by the following extract from Clark v. Barnard, 108 U. S., 436, at page 447:

"The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the

ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States.

87 We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U. S., 458, where the States *expressed* declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court."

88 The underlying principle of Clark v. Barnard has been consistently followed.

Gunter v. Atlantic Coast Line R. R. Co., 200 U. S., pp. 284-289;
Porto Rico v. Ramos, 232 U. S., 627;
Richardson v. Fajardo Sugar Co., 241 U. S., 44;
Veita et al. v. Fortuna Estates, 240 F. R., 256, 262.

As succinctly put by Mr. Justice McKenna in the Ramos case, supra, "The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

The two other cases while differing in some details are the same in principle on the questions of appealability and jurisdiction as the Sao Vicente case.

The motions to dismiss the appeals are granted.

89 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United State Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 88 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Tietjen & Lang Dry Dock Company, Libellant-Appellee,

against S. S. Sao Vicente, her engines, etc., Transportes Maritimos Do Estado, Claimant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of February in the year of our Lord One Thousand Nine Hundred and twenty two and of the Independence of the said United States the One Hundred and forty sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

90 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which S. S. "Sao Vicente," her engines, etc., Transportes Maritimos do Estado, is appellant, and Tietjen & Lang Dry Dock Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

91 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

92 [Endorsed:] File No. 28,730. Supreme Court of the United States, October Term, 1921. No. 775. Transportes Maritimos do Estado, Claimant, etc., vs. Tietjen & Lang Dry Dock Company. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1922. William Parkin, Clerk.

93 & 94 Supreme Court of the United States, October Term, 1921.

No. 775.

TRANSPORTES MARITIMOS DO ESTADO, Claimant, etc.,

against

TIETJEN & LANG DRY DOCK COMPANY.

It is hereby stipulated and agreed by and between the proctors for the parties hereto that the record already certified and filed in the office of the Clerk of the United States Supreme Court in the above entitled cause be taken as the return to the Writ of Certiorari issued herein, on condition that appellant cause writ to be returned on or before April 27, 1922.

Dated, New York City, April 10th, 1922.

F. DUDLEY KOHLER,
Proctor for Appellant.
CROWELL & ROUSE,
E. CURTIS ROUSE,
Proctor for Appellee.

95 [Endorsed:] Supreme Court of the United States. Transportes Maritimos do Estado, Claimant, etc., vs. Tietjen & Lang Dry Dock Company. No. 775. October Term, 1921. Copy. Stipulation. F. Dudley Kohler, Proctor for Claimant. 25 Broadway, (Cunard Building), New York City.

96 & 97 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, April 22nd, 1922.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

98 & 99 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Tietjen & Lang Co. v. S. S. "Sao Vicente." Return to Certiorari.

100 [Endorsed:] File No. 28730. Supreme Court U. S. October Term, 1921. Term No. 775. Transportes Maritimos do Estado, &c., Petitioner, vs. Tietjen & Lang Dry Dock Co. Writ of Certiorari and Return. Filed April 26, 1922.

101 United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MURMUGAO," Her Engines, etc.

Statement.

Libel Dec. 1, 1920.
Answer Dec. 24, 1920.
Exceptions to Answer May 12, 1921 and Notice of Argument.
Proposed Order Sustaining exceptions Aug. 2, 1921.
Order Sustaining Exceptions Aug. 17, 1921.
Interlocutory Decree August 17, 1921.
Notice of Reference Sept. 16, 1921.
Notice of Filing Report of Commissioner Oct. 20, 1921.
Exceptions to Report of Commissioner Oct. 26, 1921.
Notice of Argue, Exceptions Oct. 26, 1921.
Opinion Nov. 12, 1921.
Order Substitution Nov. 16, 1921.
Final Decree Nov. 17, 1921.
Notice of Appeal Nov. 26, 1921.
Notice of Appeal Nov. 26, 1921.
Assignment of Errors, Dec. 5, 1921.

102 *Libel.*

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel of Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company against the Portuguese steamship "Murmugao," her engines, boilers, etc., in a cause of contract, civil and maritime, alleges on information and belief as follows:

First. The libelant is a resident of the City of New York (Kings County), and State of New York, and is in the business of furnishing wharfage, stevedores, clerks, checkers, trimmers, tallymen, etc., to steamships and other vessels in the port of New York and is engaged in said business under the trade names of Battery Operating Company with an office at 2704 Bedford Ave., Brooklyn, N. Y., and Whitehall Stevedoring Company with an office at No. 15 Whitehall Street, New York City.

Second. The steamship "Murmugao," which flies the flag of Portugal, is now or will be during pendency of process hereunder within this district and the jurisdiction of the Honorable Court.

Third. The libelant, during the period from about August 8 to September 3, 1920, at the request of the agents and persons in charge of the steamship "Murmugao" and in reliance upon the credit of the said vessel, furnished certain services to the said vessel in the nature of wharfage, stevedores, clerks, checkers, watch-
103 men, coopers, tallymen, etc., in connection with the discharging and loading of the said vessel on the north side of Pier B, Jersey City. The aforesaid services were necessary to the said vessel to enable her to discharge and load cargo.

Fourth. The reasonable value of the aforesaid services amounted in all to the total sum of $25,794.02. Bills covering the various services rendered as aforesaid and amounting in all to the aforesaid total, were presented to and signed by the captain of the steamship "Murmugao" as evidence that the aforesaid services were rendered and that the charges were correct. The charges for said services constitute a lien upon the said steamship by reason of the nature of the services rendered by the libelant.

Fifth. Although payment of the aforesaid sum has been repeatedly demanded by the libelant from the steamship "Murmugao and her agents, payment has at all times heretofore been refused and the whole of the aforesaid amount is still due and owing to the libelant from the steamship "Murmugao" and her owners.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the steamship "Murmugao," her engines, boilers, etc., citing all persons having or claiming to have any interest therein to appear and answer under
104 oath the matters set forth herein; and that the court will be pleased to grant to the libelant a decree for the aforesaid sum of $25,794.02, with interest thereon from September 3, 1920, together with the costs of this proceeding; and that the court will order the steamship "Murmugao, her engines, etc., to be condemned and sold to pay the same; or that the court will grant to the libelant such other or further relief as the justice of the cause may require.

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Libelant.

Office & P. O. Address, 27 William Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Maxwell Rose, being duly sworn, says:
I am the libelant herein.
The foregoing libel is true of my own knowledge except as to the

matters therein stated to be alleged on information and belief, and as to the same I believe it to be true.

MAXWELL ROSE.

Sworn to before me this 1st day of December, 1920.
[SEAL.] HARRY D. THIRKIELD,
Notary Public, New York Co.

Clerk's No. 45, Register's No. 1150.
Certificate filed in Kings Co.
Clerk's No. 13, Register's No. 1008.

105 *Answer.*

In Admiralty.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of the Portuguese steamship "Murmagao," her engines, boilers, etc., to the libel in an alleged cause of contract, civil and maritime, brought by Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, respectfully shows to this Court and alleges on information and belief as follows:

I. Respondent denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph marked "First" of the libel.

II. Respondent denies the truth of the allegations contained in the paragraph marked "Second" of the libel, except that it admits that the steamship "Murmugao" flies the flag of Portugal and will be during the pendency of process hereunder within this district.

III. Respondent denies the truth of the allegations contained in paragraph marked "Third" of the libel except that it admits that the libelant during the period from about August 8 to September 3, 1920, at the request of the then agents of the steamship "Murmugao" furnished certain services to the said vessel.

106 IV. Respondent denies the truth of the allegations contained in the paragraphs "Fourth" and "Sixth" of the libel.

V. Respondent denies the truth of the allegations contained in paragraph marked "Fifth" of the libel, except that it admits that payment of the sum alleged has been demanded by the libelant from the steamship "Murmugao" and her agents and that payment thereof has been refused.

VI. Further answering the libel herein, and as a separate, distinct and complete defence thereto, respondent alleges upon information and belief:

1. That the steamship "Murmugao" is a Portuguese vessel flying the flag of Portugal and is owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants' Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

2. Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by the sovereign foreign government of Portugal as aforesaid and that it cannot be sued in the Courts of the United States without its consent.

107 Wherefore, respondent prays that the libel herein be dismissed with costs to the respondent as against the libelant and that the Court grant to the respondent such other and further relief as the justice of the case may require.

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
State of New York.
Southern District of New York, ss:

Jose Rocha Prista, being duly sworn, says:

I am the acting Consul General for the Government of Portugal with an office in the City of New York in the Southern District of New York. The respondent, as I am informed and believe, is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government.

I have read the foregoing answer and know the contents thereof; that the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief as to the matters stated to be alleged upon information and belief
108 are records at the Port of New York and communications received from the agents of the steamship "Murmugao."

The reason this verification is not made by the respondent is that the respondent is owned by the Transportes Maritimos do Estado, a department of the Republic of Portugal, and is not within the jurisdiction of the United States.

J. R. P.

Sworn to before me this 24th day of December, 1920.
E. H. M.,
Notary Public, New York County, No. 258.

New York County Register's No. 2325.
Commission expires March 30, 1922.

109 *Exceptions to Answer.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MURMUGAO," Her Engines, etc.

The libelant hereby excepts to the answer filed herein by or on behalf of the steamship "Murmugao" upon the ground that:

1. Said answer does not state facts sufficient to constitute a defense to the matters alleged in the libel; and

2. By appearing generally in the cause and answering the libel any claim of immunity and any claim that this Court has not jurisdiction over the parties to this cause has been waived.

Dated, New York, May 11, 1921.
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant.

110 *Notice of Exceptions to Answer.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MURMUGAO," Her Engines, etc.

SIR:

Please take notice that the foregoing exceptions will be brought on for argument at a stated term of this Court for the hearing of motions to be held at the Court Rooms in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the twentieth day of May, 1921, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated, New York, May 11, 1921.
Yours, etc., KIRLIN, WOOLSEY, CAMPBELL, MICKOX & KEATING,
Proctors for Libelant.

To Frank M. Patterson, Esq., Proctor for Claimant, 30 Pine Street, New York City.

111 *Opinion of Judge Knox.*

United States District Court, Southern District of New York.

A75—220.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

A75—III—219.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguest Steamship "MURMAGAO," Her Engines, etc., Respondent.

Kirlin, Woolsey, Campbell, Hickox & Keating (Robert S. Erskine, advocate), for libellant;
Frank M. Patterson (Howard C. Luke and M. Mackenzie, with him on the brief), for respondent.

The first of the above-mentioned suits is in personam for services rendered the steamship "Cunene," and process with clause of foreign attachment has issued. Under such process the steamer
112 "Murmagao" was seized; the second is in rem against the same "Murmagao," and appropriate process went forth thereunder and was executed.

Upon behalf of the respondent and owner and claimant of the "Murmugao" a motion of appearance was filed, which reads as follows:

"Please take notice that the respondent above named hereby appears in the above-entitled suit, and that I am retained as proctor for it herein.

Dated, December 13, 1920.

Yours, etc.,

FRANK M. PATTERSON, ETC."

In both suits the "Murmugao" was released upon her owner and claimant filing a proper bond to respond to any decree that might be rendered. The bond was in the usual form and without reservation as to any lack of jurisdiction in this court.

Some days after these proceedings respondent filed its answers, wherein it is admitted that libellant furnished certain services to the

"Cunene" and "Murmugao." Proof, however, will be required to ascertain the extent and value thereof.

In the answer to each libel it is set up, by way of a separate, complete and distinct defense, that each of the vessels to which libellant rendered services is a Portuguese vessel flying the flag of Portugal, and is owned and operated by respondent, Transportes Maritimos do Estado. That the respondent is a department of the sovereign
113 foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchant Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

Respondent objects and protests to the assumption of jurisdiction by this Court and alleges that it is a department of the sovereign foreign government of Portugal and that it cannot be sued in the courts of the United States without its consent.

Libellant in turn has excepted to the answers upon the ground (1) that they do not state facts sufficient to constitute a defense, and (2) that by appearing generally and answering the libel any claim of immunity and any claim that this court has not jurisdiction over the parties to these causes has been waived.

KNOX, *D. J.:*

There can be no question but that respondent's appearance was general for if a restricted appearance is intended it must be accompanied by some statement to that effect.

4 Corpus Juris, 1918, and cases there cited.

In this case there was no suggestion prior to the coming in of the answers to the libels that Transportes Maritimos do Estado was a bovernmental agency of Portugal or had any connection therewith.

Respondent came into court to have its property released from
114 arrest, and by so doing obtained that benefit; and now, having failed to suggest that any claim of the vessel's being immune would be raised, it should now, I think, not be permitted to litigate the alleged sovereign character of the "Murmagao."

In view of the somewhat uncertain state of the law as to the status of government owned vessels when operated for commercial purposes, as indicated by The Pesaro, U. S. Supreme Court, February 28, 1921, it is by no means certain that the action taken by the respondent was inadvisable. Had the "Murmagao" asserted her alleged immunity at the time of arrest, it is well within the range of possibility that opposition, entitled to judicial recognition, would have been interposed to her departure until the question of the Court's jurisdiction was determined. In such event the delay to respondent might have been of a serious character.

But, be this as it may, as I view the doctrine of immunity of sovereigns from suits such as these, it is not so sacred as to require

its application unless the sovereign insists upon its immunity at the very inception of a given litigation.

The Supreme Court has held in Richardson, etc. v. Fagardo Seegar Co., 241 U. S. 44, that a government may waive its sovereign attributes and I hold that in so far as the present respondent possesses only right of immunity it has waived the same.

I admit that my conclusion is not to be reconciled with that of Judge Manton in Simone v. Transportes Maritimos do Estado, decided March 16, 1921. It does seem to be, however, that so long as a distinction is recognized between general and special ap-
115 pearance such distinction must be given its logical effect.

Exceptions sustained.

August 1, 1921.

JNO. C. KNOX,
U. S. District Judge.

Order Sustaining Exceptions.

At a Stated Term of the United States District Court Held in and for the Southern District of New York at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of August, 1921.

Present: Honorable John C. Knox, District Judge.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MORMUGAO," Her Engines, etc., Respondent.

The libellant herein having filed exceptions to the answer filed by the claimant herein on the following grounds:

116 "1. Said answer does not state facts sufficient to constitute a defense to the matters alleged in the libel;

"2. By appearing generally in the cause and answering the libel any claim of immunity and any claim that this Court has not jurisdiction over the parties to this cause has been waived" and said exceptions having duly come on to be heard before this Court at a Stated Term thereof for the hearing of motions, and having been duly argued by advocates for the respective parties, and due deliberation having been had, and the Court having filed its opinion in writing directing that said exceptions be sustained, it is,

Now on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libellant,

Ordered that the exceptions filed by the libellant herein to the answer filed by the claimant be and the same hereby are in all respects sustained.

JNO. C. KNOX,
U. S. D. J.

117 *Interlocutory Decree.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of August, 1921.

Present: Honorable John C. Knox, District Judge.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

Portuguese Steamship "MURMUGAO," Her Engines, etc.

This cause having duly come on to be heard on the pleadings and exceptions filed by the libelant to the answer of the claimant herein, and having been duly argued by advocates for the respective parties, and due deliberation having been had, and the Court having filed its opinion in writing directing that said exceptions to claimant's answer be sustained, and an order having been entered herein on the 17th day of August, 1921, directing that the exceptions filed by the libelant to the answer of the claimant herein be in all respects sustained, it is now on motion of Kirlin, Woolsey, Campbell,
118 Hickox & Keating, proctors for the libelant,

Ordered, adjudged and decreed that the libelant herein have, receive and recover of and from the claimant and its stipulators the damages sustained by the libelant by reason of the matters and things alleged in the libel, with interest and costs; and it is further

Ordered that it be referred to Ben A. Mathews, Esq., Commissioner, to ascertain and compute the amount due the libelant and to report thereon to this Court with all convenient speed.

JNO. C. KNOX,
U. S. D. J.

Notice of settlement of the foregoing decree is hereby waived.

FRANK M. PATTERSON,
Proctor for Claimant.

119 *Testimony.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

S. S. "MURMUGAO," Her Engines, Boilers, etc., Respondent.

Before Benjamin A. Matthews, Esq., Special Commissioner.

New York, No. 2 Rector Street,
September 23rd, 1921.

Appearances:

Kirlin, Woolsey, Campbell, Hickox & Keating, Esq., Proctors for Libellant.
Robert S. Erskine, Esq., of Counsel.
Frank M. Patterson, Esq., Proctor for Respondent.
Howard C. Lake, Esq., of Counsel.

MAXWELL ROSE, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Mr. Patterson: I wish to state at the opening of this case,
120 Mr. Commissioner, that the steamship agents of the Portuguese government, Roderick & Rumsey, at the time these alleged services of the libellant were performed, are no longer the steamship agents of the Portuguese government, and as counsel for the Portuguese government I have no access to Roderick & Rumsey. For that reason I shall require, if the Commissioner please, after the libellant's case has been put in to have a reasonable adjournment to confer with the consul-general of Portugal and the present steamship agents in order to properly prepare for proper cross examination.

Mr. Erskine: If the Commissioner please, I object to that statement and move to strike it from the record. I object to any adjournment on the ground stated, inasmuch as Mr. Patterson has been counsel for his client in this case for about a year and has had at least eight months in which to get access to the papers and find out if the accounts are correct. I may state that last fall there were numerous conferences between myself and client, Mr. Patterson and his client, at Mr. Patterson's office, at which the libellant's bills were gone over in detail and compositions of settlement were discussed, which never materialized. I submit, therefore, there is no reason

why my client should be delayed in obtaining judgment in this case on any such excuse as that.

Mr. Patterson: I merely make this statement in advance, your Honor, so that when the time arrives you will know that the application has been made.

121 The Commissioner: It will not be necessary to repeat this statement, these statements, at the end of the direct examination. I shall pass upon the application to cross examine later after the direct examination has been concluded.

You may proceed with the examination.

Q. Mr. Rose, are you the libellant in this case against the "Murmugao"?

A. I am.

Q. What is your business?

A. Stevedore.

Q. How long have you been in that business?

A. Since 1913.

Q. Prior to 1913 had you been engaged in the employ of other people in that business?

A. Yes, sir.

Q. So that altogether how long have you been in the stevedoring business?

A. Twenty years.

Q. In August and September of the year 1920, did you furnish services to the steamship "Murmugao"?

A. I did.

Q. At whose request did you come to furnish the services in the first place?

A. At the request of agents.

Mr. Patterson: I object to that, if the Commissioner please, as a conclusion.

Q. State who they were?

A. Roderick & Rumsey at that time were the agents.

Q. In general what was the nature of the service—in a general way what was the nature of the services you rendered to the "Murmugao" on this occasion?

A. Well, I was at that time a stevedore engaged for the discharging, loading and coaling of that vessel, and also to arrange for a berth to dock the steamer as well as to arrange for the check-

122 ers, clerks, coopers and watchmen.

Q. Do I take it from that answer that you had charge of the discharging, loading and coaling, and all necessary arrangements incident thereto?

A. Yes, sir, exactly.

Q. Did you perform those services?

A. I did.

Q. Did you yourself personally have anything to do with the supervision of the work?

A. Yes, sir.

Q. How far did you personally supervise it?
A. Well, from the beginning to its finish.
Q. Do you know of your own personal knowledge that the work was done?
A. I do.
Q. When the work was completed did you render bills for these services?
A. I did, to the captain of the steamer.
Q. Do you remember what his name was?
A. I think it is Vidigna.
Q. Did the captain of the steamer make any protest as to any items of your charges?
A. Not, at all, and never at any time.
Q. Did he approve of the bills?
A. He did, by signing them.
Q. Are these the bills that I show you (showing witness)?
A. They are the bills.

Mr. Erskine: If the Commissioner please, I offer this group of bills against the "Murmugao" in evidence.
Mr. Patterson: I object to the receipt in evidence of these bills on the proof as made. There is no evidence to support them, there has been no evidence laid to show that the captain's signature to these bills are conclusive on the "Murmugao."
The Commissioner: Did you see the captain sign them?
123 The Witness: Yes, sir.
The Commissioner: Admitted.
Mr. Patterson: I take an exception to your Honor's ruling.

(Bills referred to above marked Libellant's Exhibit No. 1.)

Q. Have you yourself gone over all the items on these bills?
A. I have.
Q. Can you testify from your own personal knowledge whether or not all the services covered by the various ideas were rendered to the ship?
A. They were without a doubt.

Mr. Patterson: That is not an answer to the question.

Q. Can you testify of your own knowledge; answer yes or no.
A. Yes.
Q. Were they rendered?
A. Yes, they were.
Q. Have you yourself checked up the rates and charges for each item?
A. I have.
Q. And are they correct?
A. They are.
Q. Now, on these bills, are those signatures the signatures of the captain (showing witness)?
A. Yes, sir.
Q. And state whether or not those signatures were executed in your presence?

A. They were all executed in my presence.

Q. And you identify that as the signature of the captain of the ship?

A. I do.

Q. At the time these services were performed were you familiar with the going rates and charge for work of this kind or character in the Port of New York?

A. Yes, sir.

Q. Will you state from your own experience, if you can,
124 whether or not the rates you have charged on these bills were the proper, going charges?

A. They were.

Q. Are there any items for services contained in these bills which are necessary, or were unnecessary, to the performance of the work you undertook to do?

A. Not at all.

Q. Do you remember whether or not the work was done in the day and night, or only during the day?

A. On the "Murmugao"?

Q. Yes.

A. Offhand, I don't remember.

Q. Can you refresh your recollection by looking at these bills?

A. Yes, sir.

Q. Please do so.

A. Yes, I do remember that some of the work, loading the cargo, was done overtime; by that I mean overtime was considered overtime between seven and eight o'clock a. m. and five and six o'clock p. m.; that is the arrangement that was made between the steamship owners and agents with stevedores. That is about all the overtime there was on that vessel.

Q. Are the charges in these bills for overtime correct?

A. Yes, sir.

Q. They were the going charges for overtime at that period?

A. Yes, sir. In fact, there was a standard rate as made by the trans-atlantic conference established by the Port of New York in 1917, and which have been followed yearly, and any changes which would have been made would have been made in October of each year.

Q. Did Roderick & Rumsey raise any objection to the items in these bills?

A. None whatever.

Q. On the last sheet in this group, under the item "To bunkering coal," I notice there has been written in in ink an alteration in the number of tons and the number of dollars; will you explain that?

125 A. That was due to the fact that the tonnage, that is, the tonnages as far as bunkering of the ship is concerned was given wrong by the help that supplied the coal. In other words, a typographical error. Instead of 1,748 tons it was changed to 873 tons, which was the correct amount of bunker coal at that time.

Q. So that you corrected the bill and gave the steamship credit for the error?

A. I did not correct the bill. It was corrected by Roderick & Rumsey, the agents, as the bill shows.

Q. Was that correction made at the time the captain signed the bill?

A. That correction was made after he signed the bill.

Q. Do you know of your own knowledge that the correction is right?

A. Yes, sir. It is absolutely correct as it now stands.

Q. So that Roderick & Rumsey as agents examined the bills as signed and submitted, and that was the only correction they found?

A. Yes, sir; the only correction they found. In fact, I called that to their attention.

Q. And the corrected amount is all that we are now claiming, as far as that item is concerned?

A. Yes, sir.

Mr. Erskine: If the Commissioner please, I now rest the case of the "Murmugao."

Mr. Patterson: If your Honor please, it now appears from Libellant's Exhibit 1, received in evidence, that the exhibit had been altered after the captain had signed it without his consent or knowledge in a material respect, and also that the firm of Roderick & Rumsey, steamship agents, did not sign or approve this bill
126 in writing; and furthermore, and as the proof now stands a prima facie case has not been made by the libellant in the proof thus far submitted. All that is offered in evidence is this bill and some testimony about the captain signing it, and after his signature the bill shows that it has been materially changed. Now, save for the testimony of the libellant, that is all that is in evidence here; and this is a bill covering many items and aggregating the sum of $25,794.02.

Now, this is the itemized bill and there has been no testimony, except the omnibus statement, that this is a correct bill which, after all, is a mere conclusion of the libellant. In order to prove an account like this and make out a prima facie case the items would have been taken up by the libellant and the correctness and the reasonableness thereof, with the authority to furnish these services; all that has got to be gone into.

Mr. Erskine: Mr. Patterson, are you making a motion now? If you are, I shall move to strike it out of the record.

Mr. Patterson: I am making the motion now that, if you rest, you are liable to be dismissed as incomplete and insufficient.

The Commissioner: Motion denied.

Mr. Patterson: Exception. I now renew my motion to be allowed to confer with my clients who are familiar with these items, so as to be prepared to cross examine the libellant or until at least next week some day.

Mr. Erskine: If the Commissioner please, I object to the
127 further examination of this witness or introduction of any evidence whatsoever, on the ground that the claimant has been foreclosed.

The Commissioner: Just a moment. Let me ask this witness.

By the Commissioner:

Q. At what date was it that you presented these bills to the agents?
A. Immediately after the bills were signed by the Captain. For instance, if the steamer is finished to-day and sails to-day, I give the bills to the agents the next day.
Q. What is the last day you have there?
A. I believe it was September 1st, I am not sure. These bills were offered to the Captain for signature on September 2nd, and the bills were presented to the agents on the same day while we were en route from New York to New Bedford. That was the last day, and the bills were given to the agents the same day. I remember it very well, we finished the coaling of the vessel at five o'clock and we were in the stream and the tugboats were alongside ready to take the coal barges from the steamer, and the agents, both Mr. Roderick and Mr. Rumsey, and myself went to New Bedford with the vessel, and immediately after the bills were signed by the captain on board the steamer that afternoon, I turned the bills over to the agents.
Q. And all the other bills had been presented to the agents and approved by them prior to that time?
A. They were presented immediately after being signed on that particular steamer, yes, sir.

128 Mr. Patterson: If the Commissioner please, I object to your asking him that question. There is no signature there. As to whether they are approved or were approved is a conclusion of the witness.

Q. All these bills were then given to the agents at the same time?
A. Yes, sir.
Q. All relating to one ship?
A. Yes, sir.
Q. Did you have a conversation with Roderick & Rumsey concerning the bills?
A. No.
Q. Merely presented them to them?
A. Yes, sir, that is all.

Mr. Patterson: I do not renew my motion to dismiss.
Mr. Erskine: Well, I renew my objection as to any further evidence.
Mr. Patterson: I reserve the right to cross examine the witness at some future time, some adjourned date.
The Commissioner: I will adjourn this particular matter until Monday, September 26th, at 12 o'clock noon.
The Witness: That will be all right for me.
Mr. Patterson: That will be satisfactory.
Mr. Erskine: That is agreeable to me.

(Whereupon an adjournment was taken to Monday, September 26th, 1921, at 12 o'clock, noon.)

129 United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Name- of Battery Operating Co. and Whitehall Stevedoring Co., Libellant,

against

SS. "MURMUGAO," Her Engines, Boilers, etc., Respondent.

Before Benjamin A. Matthews, Esq., Special Commissioner.

New York, September 26, 1921.

Appearances:

Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., Proctors for Libellant.
Robert S. Erskine, Esq., of Counsel.
Frank M. Patterson, Esq., Proctor for Respondent.
Howard C. Lake, Esq., of Counsel.

(Adjourned to September 28, 1921.)

130 United States District Court, Southern District of New York.

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New York, No. 2 Rector Street,
September 28, 1921.

Appearances:

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Robert S. Erskine, Esq., of Counsel.
Frank M. Patterson, Esq., Proctor for Respondent.
Howard C. Lake, Esq., of Counsel.

MAXWELL ROSE, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Referee: Mr. Patterson, I deny your motion to dismiss, if the record shows such a motion was made by you.

131 Mr. Erskine, I also deny your motion to have the case closed, and I will permit you, Mr. Patterson, upon your application to proceed with the cross examination of the witness.

Mr. Erskine: I take exception to your Honor's ruling.

The Referee: Your exception may be noted.

Mr. Patterson: Now, how about the copying into this record that certificate?

The Referee: Oh, yes. Let the record show that the stenographer is hereby directed to physically incorporate in the record just as if the questions were repeated, the discussion and the answers to such questions on page 7 of the Transportes Maritimos do Estado case, from the words: "Cross examination by Mr. Patterson" down to and including on page 10 of that record, in the centre of the page, the words: "Mr. Patterson: Yes." That will be physically incorporated into this record of the "Murmugao."

Cross-examination.

By Mr. Patterson:

Q. Mr. Rose, I ask you if this is your signature to that document (showing witness).

A. Yes, sir.

Q. And that is your wife's signature, Bertha Rose, to that document?

A. Yes, sir.

Q. And that document was filed by you on April 14, 1919, in the office of the Clerk of the County of New York?

A. Yes, sir.

Q. The instrument is acknowledged on April 8th by both
132 yourself and your wife, Bertha Rose—April 8, 1919—by both youreslf and Bertha Rose, and before A. F. Roderick, Notary Public?

A. Yes, sir.

Q. And A. F. Roderick is the senior member of the firm of Roderick & Rumsey?

A. He is.

Mr. Patterson: If the Commissioner please, I offer that in evidence.

Mr. Erskine: I object to that exhibit for the reason that no ground is stated by counsel for the respondent for the reception of it in evidence; and I submit it has no bearing here, no bearing on the only question now before the Court, namely, the question of damages.

Mr. Patterson: I may say in answer to that, your Honor, that the order provides that you are to find the amount due Maxwell Rose, and if you will look at that certificate you will see.

Mr. Erskine: The libellant has been granted a decree for damages referred to in the libel, and if you are raising the point that there has been a non-joinder of proper party, I submit there is no such practice in admiralty whereby that question can be considered on a reference to compute damages.

The Commissioner: What I shall do now will be to incorporate this paper in the record as part of the record and to be passed upon as I may later determine.

The Witness: Bertha Rose is my wife.

The Commissioner: Suppose you read this into the record.

133 Mr. Patterson: Yes. I will read it in. Just let the record show that counsel for the respondent reads the following certificate into the record:

'STATE OF NEW YORK,
County of New York, ss:

We, Maxwell Rose and Bertha Rose, do hereby certify that we conduct or transact business under the name of the Battery Operating Company.

We further certify the true or real full name- of the persons conducting or transacting the same, are as follows:

Names.	P. O. Addresses.
Maxwell Rose.....	261 Broadway, New York City.
Bertha Rose.....	261 Broadway, New York City.

(Signed) MAXWELL ROSE.
(Signed) BERTHA ROSE.

STATE OF NEW YORK,
County of New York, ss:

On this 8th day of April, 1919, before me personally appeared Maxwell Rose and Bertha Rose, to me known and known to me to be the individuals described in and who executed the foregoing certificate, and they thereupon duly acknowledged to me that they executed the same.

(Signed) A. F. RODERICK,
Notary Public, Kings County, N. Y., No. 44.

Certificate filed in N. Y. County, 188.'

134 Now endorsed on the back of this certificate is the following:

'Certificate of Maxwell Rose and Bertha Rose, conducting the business under the name of the Battery Operating Company. Filed April 14, 1919. New York County Clerk's Office.'

The Commissioner: Let the record show that it is understood that this exhibit is copied physically right into the stenographer's minutes, the same being admitted in evidence, and also it is understood that it shall be received and admitted as the original without holding the man from the County Clerk's office here any longer.

Mr. Patterson: Yes."

Q. Mr. Rose, concerning the work alleged to be done on the steamship "Murmugao," you have testified that you gave personal supervision to the entire job; is that right?

A. Yes, sir.

Q. How many men were employed in and about this work?

A. You mean by that from the time the vessel arrives until she finished, the total number?

Q. I mean the number of men that were employed as represented by your bill, approximately?

A. In the neighborhood of about 1,800 or 2,000 men.

Q. Now, by that you do not mean, do you, men measured by hours, but you mean men?

A. I mean men, not per day, but the total necessary, the total commencing from the time the steamer commenced until she finished.

135 The Referee: That many separate individuals?

The Witness: What I mean by that is this: Say the steamer was in port 10 days and we had 100 men each day, that would mean that I employed 1,000 men altogether; might be the same men, 100 men a day for 10 days would be 1,000 men, although there might be only 100 men in all.

The Referee: When you say 1,000 men you mean 1,000 one-man days?

The Witness: Exactly, 1,000 one-man days; it may be the same men who did that work for 10 days and 10 times that would be 1,000 men.

Q. Now, how long a period of time did this work cover in which you employed these number of men you speak of?

A. From about August 9th to September 2d.

Q. In the year 1920?

A. Yes, sir, in the year 1920.

Q. Well, you mean exclusive of September 2d?

A. I beg pardon?

Q. You mean exclusive of September 2d?

A. Including September 2d; we finished the vessel that night at 6 o'clock and that is when we got away.

Q. Did that work consist of both unloading and loading the boat?

A. That work consisted of unloading and loading.

Q. And what else, if anything?

A. To services for coopers, watchmen, checkers and clerks.

Q. Was there any bunkering?

A. That is just loading and unloading. Well, that is bunkering as well.

136 Q. Now, you have made a charge for wharfage against this boat for 24 days at $400 a day. Where do you get 24 days?

A. Murmugao was due to arrive in New York—and my memory serves me quite well on that, I am sure—I think it was Monday, August 9th. She did not arrive in New Bedford until Sunday or Monday and the agents were informed of the fact that she would arrive on Monday and so I had to engage a pier for Monday, August 9th, I think, in order to obtain that berth, and figured that the most she would be detained at New Bedford would be just one day to discharge the passengers, but owing to the trouble which the steamer had in New Bedford on account of stowaways getting away

from the steamer, she was detained there for two or three days, and therefore did not arrive at the pier until a few days after that.

Q. August 13th?

A. August 13th, I believe, yes. Yes, that is right, until a few days after that, and she remained at the pier until we decided to take the steamer out into the stream in order to load her cargo of coal.

Q. What date was that?

A. I don't remember exactly. I think the reason the expense went on against the steamer was that a great deal of her cargo remained on the pier which made the pier not ready for any other steamer to dock, which made it necessary for the cargo to remain until it was all delivered.

Q. Well, what was the object of putting the boat out in the stream if you still had to pay wharfage?

A. So as to get the lighters alongside of the pier to remove the cargo and by taking the steamer from alongside of the dock
137 there would be ample room to accommodate all lighters that was calling at the dock for cargo.

Q. Did you have to pay for the four days that the steamer did not berth in the dock?

A. Yes, sir, because at that time there was another steamship company that wanted that berth and on account of business we had done with the pier previous to that time they decided to let me have that pier if I would take it from August 9th.

Q. This is the same pier concern which you testified about with reference to the Steamship Cunene?

A. This is the north side of the pier I am speaking of. The Steamship Cunene was berthed on the south side of Pier B, Jersey City, which is another berth entirely.

Q. But it is the same pier?

A. It is the same pier, yes, sir.

Q. So that at the one time the owner of the pier was drawing $800 per day from the defendant in this action for the use of this pier; is that right?

A. That is true. Pier 8, Jersey City, is a pier that is subdivided and separated by a railroad pit and each side of the pier is about 750 feet long and about 80 feet wide.

Q. Did you actually pay Joseph B. Harris, the owner of this pier, $400 per day for the Steamship Murmugao?

A. Yes, sir.

Q. As billed in your items?

A. Yes, sir.

Q. Did you pay him that by cash or by check?

A. Paid him with a check.

Q. Did you ever have any arrangement with Harris at all or anybody representing him whereby you got a rebate on this amount?

A. Never at any time.

Q. Or any commission?

A. Never.

138 Q. What was the object of the electric light service for which you have charged $109 for 109 lights at one dollar apiece?

A. It is necessary for the protection of the cargo at night to avoid robbery.

Q. Why, does not that go with the equipment on the dock?

A. It is never included in the equipment.

Q. Does the stevedore have to furnish separate equipment with each shipment?

A. Not a separate equipment but separate service.

Q. Does the stevedore with each steamer that he loads have to install a separate equipment for each job or each steamer?

A. No, sir; the equipment is stationary, they are stationary. As far as the stevedore is concerned, the dock can be in total darkness, but——

Q. Well, who do you pay the electric light service to?

A. To the man who owns the pier.

Q. And he charges you for the use of those lights at night?

A. Yes, sir.

Q. Did you actually pay Harris $109?

A. Yes, sir.

Q. And you swear that is a fair and reasonable charge?

A. Yes, sir.

Q. How much time did that cover, four nights?

A. No, sir, from August 13th to the 1st of September, the night of September 1st.

Q. How do you arrive at 109 lights? That is a combined total?

A. That is a total.

Q. And how many lights are there on that pier?

A. Oh, there may be 10 or 15, and the chances are that we used only 3 or 4 or 5 or 6; it all depends on the amount of the cargo on the pier.

Q. Now, you made a charge here for sweeping the pier and taking away refuse.

A. Exactly.

139 Q. Is that a proper charge to make?

A. Yes, sir.

Q. Wherein does your contract with the pier owner compel you to take away refuse?

A. When we engage a pier it must be in clean and perfect order, so that when we discharge a cargo on the pier there will be no chance of any damage to the cargo on the pier, and we have to leave it in the same way as we receive it.

Q. Is that a custom in the stevedoring business?

A. Yes, sir.

Q. On ths Murmugao you loaded 4,200 tons of coal, cargo coal, at $1.10 per ton, and making a total charge for that item of $4,620. Of what did that work consist?

A. That work consisted of taking the coal out of the coal boats and loading it aboard the ship and trimming it into the holds.

Q. Is $1.10 per ton a standard charge?
A. No, sir, it is not a standard charge; that is my charge.
Q. Are there other stevedores who make similar charges for similar work?
A. There may be.
Q. And you arrived arbitrarily at that figure?
A. Yes, sir, that is my rate.
Q. Don't you think that is high?
A. I do not.
Q. That would make the cost of transporting coal pretty high if you add $1.10 per ton.
A. That is due to the fact that labor was so high at that time.
Q. Could you do it for much less now?
A. Today?
Q. Yes.
A. What date is this?

Mr. Lake: September 28th.
The Witness: Well, conditions have changed and we could do it for much less, yes.

140 Q. For how much less?
A. About ten or fifteen per cent cheaper.
Q. Now, in addition you have charged here for time being paid the men while being transported from Brooklyn to stream and return, and you have for that item 825 hours at $1.52 cents per hour, making the sum total for transportation of men $1,254?
A. Exactly.
Q. Can you explain the amount of this item?
A. Yes, sir. It is the custom in the Port of New York when steamers are loaded in the stream, it is an understood fact, and a fact which I explained to the agents and the captain of the steamer at the time, that while the steamer would be loading her cargo in stream it would be necessary to pay the men from the time they went to the stream until they returned, and the time consumed in taking the men from the dock to where the steamer was lying in stream was three-quarters of an hour in the morning and three-quarters of an hour in the evening, which was done during the so-called overtime before 8 a. m. and after 5 p. m. which brought in the overtime rate.
Q. Is such a charge as that customary with stevedores?
A. Yes, sir.
Q. Do you know of other firms that make such a charge?
A. I really believe that all stevedores make a charge of that kind.
Q. Don't you consider this a pretty stiff charge?
A. For the work done, I do not; for the work done and the nature, and under the conditions, I do not.
Q. Now, you have got another overcharge item to loading cargo

of coal, overtime: From 7 a. m. to 5 p. m., 1,100 hours at 50
141 cents per hour, making a total of $550; how do you explain that in addition to the overtime item for transportation, for transporting them?

A. It is considered or was considered and is considered at the present time customary to work a steamer between the hours of 7 o'clock and 8 o'clock a. m. and the hours of 5 and 6 o'clock p. m., overtime.

Q. Well, what was the object of starting these men to work at 7 a. m., in the morning, and holding them until after 6 p. m. so as to create this overtime charge?

A. So that it would be expedited, so that it would expedite the loading of this coal, to get the steamer at New Bedford where the passengers were waiting for several days to embark on this steamer to make their voyage to Portugal.

Q. Did your agents know of this overcharge——

A. Yes, the agents knew of it and the captain as well.

Q. Wait a minute. I mean at the time it was incurred?

A. Yes, and the agents and captain as well.

Q. Did they approve of it?

A. Yes, sir, they approved of it and agreed to it.

Q. You have got a number of charges following this item of $550 for overtime. Do you explain that in the same way as you have the other overtime charges?

A. Yes, sir, in order to get the men to go to the steamer in the stream it was necessary for us to employ boats to carry these men to the vessel, and that covers the charge for transportation of the men from Brooklyn to the stream and return morning and night.

Q. Now, you also have an item for extra men employed trimming the coal in the lower holds of $212.16, $79.04, $310.08 and
142 $42.56. How do you explain those?

A. Those items are covered by the fact that 24 men and a foreman comprises a coal gang.

Q. Well, is this the same explanation that you made in connection with the item of trimming the coal on the Cunene?

A. Yes, sir.

Q. And your answer, stands then the same as in the case of the Cunene?

A. Yes, sir, exactly.

Q. Now, in discharging the inward cargo, you have made a charge for 11,789 bales of corkwood and corkwaste at 25 cents. Do you consider that a reasonable charge?

A. Yes, sir.

Q. And the going charge in the Port of New York?

A. Yes, sir.

Q. And was that an arbitrary charge of your own?

A. If what you mean by a going charge——

Q. Well, would other stevedores charge the same for similar work and did they charge it at that time?

A. I don't know of any other stevedores that charges that rate, but I do know that it was a fair rate at that time.

Q. Well, you don't know that other stevedores did charge as high as that but you know that you charged that and that is all you know about it?

A. I went into details with other stevedores about corkwaste and their charges were the same as mine.

Q. Does that apply to the 469 bags of argols, 36 bags of ergot rye, 12 cases of ergot rye, 9 cases of cartridges, 30 cases of fish and 20 cases of furniture for all of which you have made respective charges?

A. Those charges I did not go into with stevedores in detail, but I would say they are very fair and reasonable charges.

Q. I also notice you have an item here for winch-driving time. Don't you consider that should properly come within the
143 charge for discharging cargo?

A. No, sir. If I were to include my winch-driving time my rate for discharging would be somewhat higher.

Q. In other words, you make the same explanation on this item against the Murmugao as you did against the Cunene?

A. Yes, sir.

Q. You have also a large item here, the sum of $1,098.04, for tiering cargo on dock, trucking cargo to bulkhead and farm, and breaking down cargo for delivery, a combined amount of 1,152 hours at 97 cents per hour, or a total of $1,098.04. You also consider it fair to make an extra charge for these items in addition to charging for unloading?

A. Yes, sir.

Q. Do you make the same explanation with reference to this item against the Murmugao as you did against the Cunene?

A. Yes, sir.

Q. Do you think it was expeditious and proper handling wherein it took 1,152 hours at 97 cents per hour, to tier this cargo and truck it?

A. Yes, sir.

Q. Were you in constant supervision of this work, all over the dock?

A. Yes, sir, between that and the steamship Cunene.

Q. And do you know of your own knowledge that this number of hours was actually consumed by the men in doing this work?

A. Yes, sir.

Q. By the way, how do you pay your men, by check or cash, or how?

A. By cash.

Q. And do you take a receipt from them?

A. No, sir. We take the check that we give them. We give them a brass check when they go to work on Friday and which we take up when we pay them.

Q. You have no written receipt or vouchers of these pay-
144 ments?

A. No, sir. We have an agency that supplies us with all of our men.

Q. And does that agency supply you with all the men you employ for all kinds of work?
A. Yes, sir.

The Referee: Clerks as well as stevedores?
The Witness: Clerks, no, sir. We just keep a record of the clerks and pay them every week.

Q. Are not your clerks employed in connection with your entire business?
A. No, sir; clerks are under a different heading entirely. Clerks don't come under the head of stevedores or stevedoring. Clerks are engaged to receive and deliver a cargo.
Q. Are they hired then for each particular job?
A. Yes, sir, for each particular job.
Q. Are you able to get these men promptly if you wish them when the steamer comes in?
A. Why, we have always a batch of men on hand that we can call on when we need them and put them to work as we need them.
Q. In the same way that you go out and get stevedores or laborers?
A. Yes, sir, in the same manner as we get our laborers.
Q. In making your payment or payments to the man who owned the dock, in addition to the check which you gave him, did you get a receipt or receipts?
A. No, sir, never got any receipts of any kind.
Q. You simply paid him by check?
A. Yes, sir.
Q. And treated the check as a receipt, the returned check?
A. Exactly.
145 Q. Do you happen to have those returned checks?
A. In fact, the bill is not all paid yet.
Q. Well, do you happen to have any of those checks showing that you paid him $400 a day?
A. I did not pay him by the day; I paid him lump sums against these accounts.
Q. Do you mean to say that you gave him the check covering lump sums but you did not send any statement—was there not an invoice sent by him to you?
A. Oh, yes, I have his invoices.
Q. Would you mind producing the checks and invoices?
A. Not at all.
Q. Will you do it at the next hearing?
A. Certainly, yes, sir.
Q. Could you get them here today?
A. No, I don't think I could get them here today, but if you had told me the other day that you wanted them I would have brought them here today.
Q. You have an item here for tallying, watching and coopering inward cargo, totalling $2,177.35, showing a lot of clerks and checkers and watchmen and coopers that were employed at large sums per day. You also have on this item or these items even

overtime charges in a considerable amount. How do you explain any such charge or charges as that?

A. Those are the wages the men received. Clerks, $8.50 per day; dock clerks, $8.50; checkers, $6.50; watchmen, $5.00 per ship, and coopers at $7.50 per day. In other words, I paid the men that amount, less 50 cents, 50 cents being my profit on each man. On the dock clerk I make 50 cents, for instance, per day, and the checkers I paid them $6.00 and I charge $6.50. I simply charge 50 cents per day additional. On the watchmen I make a
146 profit of 50 cents per man, and the same way with the cooper, I make 50 cents per man.

Q. Were those the going charges for labor at that time?

A. Yes, sir.

Q. Did you actually pay those wages?

A. Yes, sir.

Q. In view of the large charge made here in other parts of the bill, was that a fair and reasonable item to charge up against your client to make a profit on the labor employed?

Mr. Erskine: That is objected to, if the Referee please.

The Referee: Objection overruled.

Mr. Erskine: I take an exception.

The Witness: Yes, sir. I am in business for that purpose, you know.

Q. But you were charging in this bill as a stevedore for doing certain kinds of work and not as a lazzaroni or employer of labor?

A. Stevedoring is one branch of the business, and engaging watchmen, coopers and clerks is another branch of handling a vessel.

Q. This is put in the nature of disbursements for labor and on which you are adding a profit of 50 cents per man.

A. And to which I am justly entitled, and that is the kind of charge all firms in that line of business make.

Q. Is that a usual charge?

A. Yes, sir, it is.

Q. Do other stevedores in work of this kind and under these conditions make that kind of a charge?

A. Yes, sir.

The Referee: I understand it is not a stevedoring operation.
147 The Witness: Some stevedores employ checkers, coopers and watchers, but they all make that 50 cents a charge in addition to what they have to pay the man.

Q. You have made a charge here for cleaning the lower holds, and after between decks, with loose corkwood and corkwaste, as per instructions from captain, on account not having sufficient crew. For that item you charge $446.20, and for that same item you show here 460 hours at 97 cents per hour.

A. That is just as it shows there. That item covers this work which was done as per instructions from the captain on account of

not having sufficient crew, the crew having deserted the ship and a great quantity of this corkwood waste laid in the holds of the ship, and in order to give the steamer a complete return and a clean bill of delivery, it was necessary to gather up this corkwood and corkwaste and put the same on the pier there so that the coopers would have a chance to make up bales that would offset any shortages.

Q. Now, here is an item to labor supplied helping coopers fill bags with loose corkwood and corkwaste. You have a charge for that item of $252.20. Is that a proper charge?

A. We had to have a man to shovel this corkwood and corkwaste into bags so that the coopers could sew it up and put it on the dock and that is the reason for that labor.

Q. Ordinarily that kind of work would be done by the crew, would it not?

A. Yes, sir, by the crew.

The Referee: But this vessel, you say, was without a crew?

148 The Witness: This vessel had very few of the crew left, and they had to do the work about the deck of the steamer. The captain ordered me to do that work.

Q. And did the agents know of this and approve of it?

A. Yes, sir, they approved of it, and asked me to do it.

Q. Who were the agents in charge of the "Murmugao"?

A. Roderick & Rumsey.

Q. Which one did you do business with, generally?

A. Both.

Q. You have an item here for bunkering coal and stowing same in bunkers, 873 tons at $1.10 per ton, at a total cost of $960.30. Is that distinct from the cargo coal?

A. That was used for bunkering purposes only.

Q. Do you consider that a reasonable charge, $1.10?

A. Yes, sir.

Q. And in view of the fact that you had already charged for this other cargo coal?

A. This is a separate operation.

Q. I am asking you do you consider that a reasonable charge?

A. Yes, sir.

The Referee: Is this the same coal or part of the same coal included in other items?

The Witness: No, sir. These 873 tons were to be used for the ship's bunkers only, to be burned on the trip going across.

Q. You have also here an item to extra men employed trimming coal in bunkers, in excess of 24 men, a total of 310 hours at $1.02 per hour, or $316.20.

A. Yes, sir. The same applies in this case as in the other, they were in excess.

149 Q. You have also here time paid men while waiting for coal, gang sent home. You have a charge there of over $70.

A. Yes, sir. That is due to the fact that the men were ordered

out on the 14th of August to put this coal on board, and after they were aboard ship for awhile and waiting without finding out from the coal company that they could not deliver the coal that day, and so we were compelled to pay those men for the two hours while awaiting.

Q. So far as the days are concerned in this bill, were you there all the time?

A. Yes, sir.

Q. Personally?

A. Yes, sir.

Q. Did the captain make any payment on account of this bill to you?

A. No, sir.

Q. Or Roderick & Rumsey?

A. On account of this bill, no, sir.

Q. Now, the winch was broken by your employees on board the "Murmugao" and it cost $800 to replace that winch. Did you make an allowance in that bill for that?

A. Never to my knowledge did we ever break a winch during the whole course of our operations.

Q. Well, you know the claim was made by Roderick & Rumsey, that you did break a winch?

A. Never knew of it and never heard of it until this moment.

Q. Well, if your memory is now refreshed, are you willing to make any allowance for the broken winch?

A. No, sir, I will not make any allowance for breaking any winches, for we never broke a winch.

Q. There was a winch of the "Murmugao"?

A. There were several winches on the "Murmugao."

Q. And you never heard of breaking one as the result of
150 your operations at any time?

A. Never at any time, and I was on that vessel up to the time we left New Bedford and everything then was all right, nothing was said about our breaking the winch during the operation.

Q. If this boat, as it appears from this bill, was at the pier 18 days, why was it necessary to have overtime?

A. The chances are that we did not have overtime, and overtime applies only to clerks and coopers, which was for the reason to expedite delivery, and the chances are the cargo would have remained on the pier a few days longer, and in order for us to expedite delivery of this vessel and to eliminate any further extra expense for wharfage, our delivery usually started at seven o'clock in the morning, which is overtime, and continued to eight o'clock, and continued between five and six o'clock p. m., which is also considered overtime.

—. Ordinarily how long would it have taken to unload and load this boat if you had devoted only the usual hours of work, how many days?

A. That is not quite clear.

Q. Ordinarily if that boat had come into the pier on the day it was engaged and you had promptly begun unloading it and then

the loading of it, how long under ordinary circumstances would it have taken to have accomplished that work?

A. The same length of time that she was there originally, less the four days lost by being in New Bedford, being detained there on account of stowaways getting away from the steamer.

Q. Then I understand that it would have taken approximately fourteen days to load and unload this boat.

A. It would have taken seven days to unload her and four days to load the vessel.

151 The Referee: Without overtime?

The Witness: Without overtime. When there was overtime—well, yes, there was some overtime—it would have taken another day for loading.

Q. And it would have taken seven and eight days?

A. It would have taken seven days for discharging and five days for loading, if we had not worked overtime on loading.

Q. Well, here is a boat that was charged for eighteen days, and four days you have explained as representing the interim that it had not arrived on time, and so therefore there are two days unaccounted for.

A. That is due to the fact that the cargo remains on the boat after the ship is charged. It does not mean to say that the cargo is completely removed from the pier even after the steamer is discharged.

Q. Don't you make an effort, every effort as a stevedore in the prompt and careful discharge of your duties, as fast as the cargo is discharged simultaneously to have it shipped from the pier to the consignees?

A. Exactly. We make every effort to have the cargo removed as quickly as possible, but that would rest, of course, with the consignees.

Q. What would you do with consignees that did not take their goods away promptly, would you still retain the pier and charge $400 a day for it?

A. No, sir. We give them a reasonable time to remove it and if they do not take it away, we put it in store; but at that time the conditions in Jersey City were such that they could not accommodate any corkwood, and even if they did at that time, or if there
152 was room at that time, they could not accommodate the cargo that was on the pier.

Q. Now, Mr. Rose, have you made any effort to get a copy of the written rules of the Transatlantic Conference?

A. Yes, sir.

Q. Have you got such a copy?

A. Yes, sir, I have it with my attorney here.

Mr. Patterson: Have you any objection to producing it, Mr. Erskine?

The Witness: Certainly not, as far as I am concerned.

Mr. Patterson: May we have it, Mr. Erskine?

Mr. Erskine: I have no objection to your seeing it, but I was just

thinking whether I would give it to you or put it in the record in my part of the case. I shall reserve the right to introduce these rules in rebuttal, after the conclusion of your case.

Mr. Patterson: May I look at it now irrespective of what you do with it?

Mr. Erskine: I object to any statement being made on the record except that you call for the production of the evidence.

Mr. Patterson: I ask Mr. Erskine now if he will let me see those rules, a request in which his client has acquiesced in.

Mr. Erskine: I reserve the right to produce those documents on rebuttal testimony of this witness, if I see fit to do so.

Mr. Patterson: Do you refuse to let me see the document at the present time, Mr. Erskine?

Mr. Erskine: Yes.

Mr. Patterson: All right.

153 Q. I notice that when this bill was rendered, Mr. Rose, to Roderick & Rumsey for bunkering coal, you put in 1,748 tons at $1.10 per ton, and they apparently wrote in over it 873 tons and did not approve the bill as originally submitted to them.

A. That is not so.

Q. Well, I show you the bill and show you Roderick & Rumsey's statement correcting it.

A. When that bill was presented I found there was a mistake made in the total number of tons on the face of the bill and I asked Roderick & Rumsey to make the change themselves, which they did.

Q. Did you have any arrangement with Roderick & Rumsey for a rebate of any kind or a division of commission, directly or indirectly?

A. No, sir.

Q. And is your testimony in the Cunene case with reference to your business relations with Roderick & Rumsey in regard to a certain corporation, the same in this case?

A. Yes, sir.

Q. You know that the government at Lisbon among other things in connection with the agency of Roderick & Rumsey, objected to this bill and that of the Cunens on the ground that it was excessive?

A. I do not know that to be a fact. This is the first I have heard of it.

Q. Don't you know that was one of the grounds which the government stated for terminating the agency of Roderick & Rumsey?

A. No, sir, I do not.

Mr. Erskine: I object to that as immaterial.

Mr. Patterson: If the Referee please, at the present time I would like another adjournment, at least until those vouchers are
154 produced, and probably in the meantime I shall be able to get a copy of that Transatlantic Conference.

The Referee: Are you now prepared to state the objections you have to the accounts in bills in the "Murmugao" case?

Mr. Patterson: I do not quite understand you.

The Referee: At the adjournment on Monday last I indicated that a further adjournment would be taken at the close of the session today until next Monday, if we were not able to close the hearings today, and that we would proceed for three hours today in order to close the hearing, and that if we were not able to close the hearing today I would require you to state your objections to the bills—in brief, to make an opening statement of what you expected to prove.

Mr. Patterson: I am not prepared at this time to state that, as I have not concluded yet the complete cross examination. It is apparent now that there are certain vouchers which may be of service to me and also the examination of the Transatlantic Conference may be of service to me in cross examining this witness. They may or they may not influence what I will do in cutting in a defense. I may at that time rest on the cross examination thus far conducted, and on the exceptions taken in the course of this case, together with certain motions.

The Referee: Mr. Patterson, you will proceed further with
155 the cross examination until you are permitted to close at this time.

Mr. Patterson: What do you mean by at this time?

The Referee: Now.

Mr. Patterson: Why, I am not ready to cross examine any further now until I have examined the Transatlantic Conference, a copy of which is in this room and which has been refused to me by counsel for the libelant, although the libelant himself has acquiesced in it; also there are certain checks and vouchers which the libelant has promised to produce and which I find it necessary to examine before I can continue the further cross examination.

Mr. Erskine: In the first place, let me correct that statement in one respect. I find that the copy of the Transaltantic rules referred to are not in this room, because I find in looking through my file here that I have left that copy in my office. I am perfectly willing, if the Referee sees fit, that Mr. Patterson may reserve his right to question the witness on the vouchers when produced, but I submit that any further cross examination must now be limited to that one point.

Mr. Patterson: How about the Transatlantic Conference a copy of which I have not been able to see? I am entitled, I submit, to a reasonable time to obtain a copy of those rules.

Mr. Erskine: You have had it.

Mr. Patterson: I have not. I was here today at two o'clock and it is now after four o'clock p. m.

156 Mr. Erskine: It is now four minutes, all of which time you have consumed but for one hour examining this witness.

Mr. Patterson: I differ with that. The Referee came in here just before three o'clock; and I maintain now that in view of the fact that an examination of the Transatlantic Conference may be important to my client that I be given an opportunity to examine that and also examine the vouchers before I am foreclosed on further examination. It may be that when I have examined the conference and the vouchers that there will be no further cross examination,

but I submit that my client should not be foreclosed in such a reference as this at this time.

The Referee: Well, my ruling will be on consent of Mr. Erskine you may cross examine on the vouchers and other papers to be produced by the witness concerning the bill from Harris. As far as the Transatlantic Conference is concerned, I won't permit any further cross examination at a fixed date on that matter or on any other matters about which you may wish to inquire of this witness, except those that may hereafter be brought out by further direct examination either in chief or on rebuttal by claimant's proctor.

Mr. Patterson: Counsel for the defendant takes exception to the Referee's ruling foreclosing him from further cross examination, except as he has stated would be allowed.

Mr. Erskine: I request the Referee that, in view of this de-
157 mand or application for an extension of time to examine or cross examine the witness on the vouchers and bills of Mr. Harris, that this hearing continue tomorrow afternoon for that purpose.

Mr. Patterson: I beg to state to the Referee that in view of his statement at the last hearing that any adjournment go over until Monday. I have made other engagments for Thursday and therefore I cannot go on.

Mr. Erskine: Well, Mr. Lake will be here, will he not?

Mr. Patterson: I am conducting this examination.

The Referee: I shall adhere to my original plan for adjournment.

Mr. Erskine: I make the further motion that in view of Mr. Patterson's position on this record that he be directed to say in what respect and as to what items the libellant's bills are in dispute, and that the claimant and respondent in these two cases be foreclosed from any further evidence, except the cross examination of Mr. Rose as to the bills.

Mr. Patterson: It may be that after I have had a conference this evening or tomorrow with the Consul General, representing the defendant government, that I may decide on Monday after completing the cross examination of Rose, to rest upon the plaintiff's case on the ground, on certain legal grounds, but, on the other hand, it may be that, as the result of this conference, the Consul General may be willing to go further in disproving this claim and not
158 rest on the legal grounds at the end of the plaintiff's case.

The Referee: Very well. We will adjourn the case now until Monday next at two o'clock p. m., and we will endeavor to close the case on that day, and if counsel for the claimant or for the libellee in the two cases has evidence to offer he should produce it on Monday.

Mr. Patterson: At what time?

The Referee: At two o'clock p. m.

(Whereupon the further hearing in the above-entitled matter was adjourned to Monday, October 3, 1921, at 2 o'clock p. m.)

159 United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Name- of Battery Operating Co. and Whitehall Stevedoring Co., Libelant,

against

S. S. "MURMUAGO," Her Engines, Boilers, etc., Respondent.

Before Benjamin A. Matthews, Esq., Special Commissioner.

New York, No. 2 Rector Street,
October 3, 1921.

Hearing resumed pursuant to adjournment.

Appearances:

Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., Proctors for Libelant;
Robert S. Erskine, Esq., of Counsel.
Frank M. Patterson, Esq., Proctor for Respondent;
Howard C. Lake, Esq., of Counsel.

MAXWELL ROSE, resumed the stand.

Cross-examination continued.

By Mr. Patterson:

160 Q. Mr. Rose, during your direct examination you testified concerning the conference of the International Longshoremen's Association with the deep water steamships and stevedores of the Port of New York City and vicinity, referred to by you as the Atlantic Conference?

A. Transatlantic Conference.

Q. Yes, Transatlantic Conference. Now, I have here a copy of that report which I secured last Saturday, and I wish to ask you if you are familiar with subdivision B of Section 2 of that report, which reads: On general cargo from 8 a. m. to 12 o'clock noon on all week days and from 1 to 5 p. m. of all week days, exclusive of Saturday afternoon, men shall receive 80 cents per hour.

Mr. Erskine: If the Commissioner please, I object to that question on severl grounds. In the first place, on the ground that the matter has been foreclosed by your Honor as to any cross examination on this point, and, without waiving that objection I also point out that the statement of Mr. Patterson as to the nature of the document which he has in his hand is not and cannot be accepted as proof of the document.

The Commissioner: T-e objection is sustained.

Mr. Patterson: I take an exception to your Honor's ruling.

Does your Honor sustain the objection on both grounds, because I want to know what I except to. I might not except to one and except to the other, or vice versa.

The Commissioner: Yes, I sustain the objection on the ground or grounds stated.

Mr. Patterson: Very well. I take an exception to the ruling as made.

161 If the Commissioner please, I offer for identification only and ask to have marked as our exhibit this copy of the rules of the Transatlantic Conference.

(Copy of paper referred to by Mr. Patterson marked Respondent's Exhibit A, for Identification, of this date.)

Q. Mr. Rose, you are familiar, are you not, with the provisions of the Transatlantic Conference, as testified to by you on your direct examination?

Mr. Erskine: If the Commissioner please, I object to that on the original ground as stated by me, namely, that the claimant is foreclosed by any further cross-examination on this point by reason of your Honor's previous ruling.

The Commissioner: Objection sustained.

Mr. Patterson: Exception.

Q. I show you what purports to be a copy of the Transatlantic Conference, Mr. Rose, and ask you if that is not a correct copy (showing witness)?

Mr. Erskine: I ask that Mr. Patterson, if he persists in this line of examination, be foreclosed entirely.

Mr. Patterson: If the Commissioner please, I am simply laying a basis for this examination.

The Commissioner: As cross examination of this witness, the objection is sustained.

Mr. Patterson: And I take an exception to your Honor's ruling.

162 Q. Mr. Rose, are you prepared to offer any explanation why, if the Transatlantic Conference to which you referred on your direct examination provides for only 80 cents per hour to be paid to men on general cargo on all week days, exclusive of Saturday afternoon, you have billed the Transportes Maritimos do Estado in this case $1.10 per hour.

Mr. Erskine: Objected to on the same ground as before.

The Commissioner: Objection sustained.

Mr. Pattersoin: I take an exception to your Honor's ruling.

The Commissioner: Let the record show that I sustain these objections solely on the ground or grounds that the cross-examination of this witness on this point was closed at a former hearing.

Mr. Patterson: Well, you mean it was closed by you and not by my consent or with my consent.

The Commissioner: Well, the record shows.

Mr. Patterson: Well, it might be held to be closed by me, and for

that reason I want the record to show that I did not close it. I wish the record to show that counsel, that the proctor for the respondent begs to point out to the Commissioner that the closing of the further cross-examination by him was a ruling by the Commissioner without the consent of the proctor for the respondent.

Q. Mr. Rose, this subdivision, or rather this paragraph 2 of
163 subdivision F, of the Transatlantic Conference, provides that all men employed on bulk cargo, ballast, and all coal cargoes, including loading and trimming coal for the steamer's own bunker purposes shall receive 85 cents per hour between 8 A. M. and 12 o'clock noon, and from 1 to 5 P. M., except Saturday, and in your bill here you have charged here 97 cents per hour; have you any explanation to make of this item?

Mr. Erskine: If the Commissioner please, I make both objections again; First, that the claim is foreclosed as to this line of cross-examination; and second, that there is no proof before the Commissioner of the fact which Mr. Patterson is basing his question upon.

The Commissioner: Objection sustained.

Mr. Patterson: And I take an exception.

If the Commissioner please, I now offer in evidence a copy of the report of the matter of the International Longshoremen's Association against The Deep Water Steamship Lines and Contracting Stevedores of the Port of New York City and Vicinity, called the Transatlantic Conference.

Mr. Erskine: If the Commissioner please, I object to that on the ground of foreclosure, also on the ground that the document has not been proved in any way.

The Commissioner: The objection is sustained on the ground that the document has not yet been proved in any way.

164 Mr. Patterson: If the Commissioner please, I would like to have it understood now if I am to be foreclosed, from any further cross examination, as it will save me trouble in asking these questions.

The Commissioner: As far as cross-examination is concerned, yes, referring particularly to the so-called Transatlantic Conference Report.

Mr. Patterson: Well, is there anything else that I am at liberty to go on with?

The Commissioner: Well, you are at liberty, under the ruling made at the last hearing, to examine the documents which the witness was to produce today, that is, the vouchers, I believe.

Mr. Patterson: Well, I am not desirous of cross-examining him on those vouchers but I am desirous of cross examining him on other items. Do I understand that I am foreclosed on anything but the vouchers?

The Commissioner: Yes.

Mr. Patterson: Well, I respectfully take an exception to your Honor's ruling.

Mr. Erskine: Do you rest?

Mr. Patterson: As far as this witness is concerned, I am compelled to rest by the Commissioner's ruling.

Mr. Erskine: As to this witness?

Mr. Patterson: There is nothing further for me to cross-examine him on.

The Commissioner: Have you rested?

Mr. Erskine: Yes.

The Commissioner: I understand that the claimants rest,
165 and there is no further witness or document or documents to examine.

Mr. Erskine: Well, only as to the point of the vouchers, and Mr. Patterson says he is no longer interested in them.

Mr. Patterson: I have made my position clear.

The Commissioner: Very well. That closes the testimony and the evidence so far as the libelant is concerned.

The Commissioner: Have you any proof to offer on the part of the claimant or the respondent?

Mr. Patterson: I understand that the libelant's case is rested.

I now move to dismiss the claim of the libellant, first, on the ground that there is apparent misjoinder or non-joinder of the real parties in interest in this claim, and that it will be impossible, therefore, as the pleadings and proof now stand, for the Commissioner to ascertain the amount due the libellant, or any amount; second, on the ground that the libelant has not proved properly and sufficiently any damages on which the Commissioner can make an award of any amount due; third, on the ground that a proper basis has not been made for the proof offered by the libelant in attempting to sustain his claim.

I also move to terminate this reference and dismiss it on the ground that it appears that the pleadings and present status of the case is not in shape for the Commissioner to pass upon the questions referred to him.

166 Mr. Erskine: If the Commissioner please, I object to the motion. Without waiving any of the objections open to me as to this motion, I object first on the ground that it cannot be entertained unless the claimant and respondent states or is held by the Commissioner to have also rested.

The Commissioner: I would like to hear from you, Mr. Patterson, on the point taken by the libelant that the Special Commissioner is without power to pass upon your motion, unless you have stated that you have rested.

(At this point discussion and argument ensued off the record.)

The Commissioner: I reserve decision on the motions to dismiss until both sides have rested.

Mr. Patterson: I take an exception to your Honor's ruling.

Let the record show that proctor for the respondent now rests and renews each and every motion made at the close of the libelant's case and upon the same grounds stated therein.

Mr. Erskine: If the Commissioner please, I object to this motion, reserving my objections to the Commissioner's ruling on the motions as made at the close of the libelant's case.

I also object to the motion generally that the grounds are not well taken, and specifically as to the question of non-joinder. I object

to the question raised by the respondent as not now before
167 the Commissioner and that this is not the proper place and time at which to raise any such question.

I submit further that there is no proof of any non-joinder or misjoinder, and if there has been non-joinder, which I do not admit, I shall apply for leave of the Court to correct the non-joinder nunc pro tunc, without prejudice to any and all proceedings heretofore had herein.

I call the Commissioner's attention to the fact that the respondent and claimant in its answers admits that the libelant has rendered services for which the libelant has not been paid.

The Commissioner: Now, do I understand that, by consent, that all which relates to this matter of partnership is to be physically incorporated in the other record?

Mr. Patterson: Yes, sir.

Mr. Erskine: Yes.

The Commissioner: Very well. Then let the stenographer note on this record to be taken in in the other record the following: The stenographer will incorporate physically into the record of the Murmugao case the testimony at pages 45, 46 and 47, beginning with the words at the bottom of page 45 "Mr. Erskine," down through and including the words "A. Yes, sir, exactly," near the bottom of page 47. Now, that is to be physically incorporated into the Murmugao record.

The Commissioner: It is understood now that everything
168 in the other record, in both records, may be considered in the two cases, the record of the two cases, both having been tried practically together.

Mr. Patterson: I want it understood that the motions I have made are to be incorporated in the other record, just as though they were made at the time in the other record.

The Commissioner: Yes, that should be and will be done.

Just one thing further: It is agreed between counsel that they will exchange authorities and such memoranda and argument as they desire to submit and which will be filed with the Commissioner by next Wednesday, October 5, 1921, at 12 o'clock noon.

(The copying in of pages 45, 46 and 47 of the Transportes record above referred to by the Commissioner, is as follows:)

"Mr. Erskine: If the Commissioner please, without prejudice to my objections to the certificate which has been offered in evidence by Mr. Patterson, I will ask the witness this question:

"Q. State who were the parties comprising the Battery Operating Company at the time the services were rendered?

"A. My wife and myself.

Q. Do you remember whether or not at the time you gave me the information to draw this libel you advised me of any interest
169 of your wife in the company?

A. I guess I forgot that.

"Q. How did you come to forget it?

"Mr. Patterson: Oh, I object to this as immaterial and irrelevant.

"The Commissioner: Objection sustained, but I will permit the witness to answer and give the answer nevertheless. I want it physically incorporated in the record so that the court will see it.

"The Witness: Being my wife, I did not think it was necessary, that is all. We were partners in everything else in life, and I did not think it was necessary to mention the fact, in fact, I never gave it a thought.

"Q. Have you during all the time that your wife has been associated with you conducted the business yourself?

"A. Yes, sir.

"Mr. Patterson: I object to the question and I move to strike out the answer of the witness thereto on the same grounds that I have heretofore made as the basis of my objection.

"The Commissioner: The motion is granted.

"By the Commissioner:

"Q. What portion of interest does your wife hold in the business?

"A. Half interest.

Q. And you say you have actually conducted the business yourself?

A. Yes, sir, absolutely.

"Q. Done all the work?

"A. Yes, sir.

170 "Q. What does your wife do in connection with the business?

"A. Well, she used to keep some accounts, and all that sort of thing, nothing to speak of; help me with my typewritng; that is about all she ever did.

"Q. In other words, you and your wife were equal partners in this business of the Battery Operating Company?

"A. Yes, sir, exactly."

(Hearing closed.)

171 *Commissioner's Report.*

United States District Court, Southern District of New York.

In Admiralty.

No. 75-220.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Ben A. Matthews, appointed Commissioner herein, by interlocutory decree and order of reference made and entered in the above entitled proceedings, do hereby report as follows:

That I was on September 23, 26, 28 and October 3, 1921, attended by the proctors for libellant and respondent and the libellant in person. The libellant, Maxwell Rose, was the only witness examined or called.

I find that the libellant has been engaged in the stevedoring business for twenty (20) years and has been in such business for himself since 1913. In July, 1920, he was employed by Roderick & Rumsey, then the agents for the respondent, to render services in securing a berth for the steamship "Cunene" and for dis-
172 charging, loading and coaling her, as well as for arranging for and providing checkers, clerks, coopers and watchmen and making the necessary arrangements incident thereto. When the work was completed bills were presented to the captain of the "Cunene," who approved same by signing them. Immediately thereafter these bills were presented to Roderick & Rumsey, the agents. These bills were received in evidenc- as Exhibits 1, 1A, 1B, 1C and 1D, and are hereto annexed as a part of this report.

Libellant personally supervised the performance of the work and the furnishing of the services, etc., covered by the bills. He testified, and I find, that the bills correctly state the items for services to the ship and that the amounts charged are based on the usual and customary, or "going" charges for like services at the Port of New York. I also find that all the items for services contained in the bills represent services necessary to the proper performance of the work for which libellant was employed.

Hearings in this matter and in the case of Maxwell Rose, etc., against the steamship "Murmagao" (Docket No. A—75-219, similarly referred to me) were held on the same days. At the outset it was contemplated that the record in each case should be complete and independent of the other. Identity of parties, proctors and wit-

ness, however, has resulted in the failure to accomplish this result. The two records, therefore, must be read to get a complete picture of either case. At the close of the hearings proctors stipulated that this might be done.

Libellant was frank and direct in his answers on cross examination and explained carefully and in some detail each item covered by the bills about which he was interrogated. There was no
173 evidence whatever offered by respondent after libellant finally rested its case. In the memorandum filed with me at the close of the proceedings claimant does not attack any of the items. Part of claimant's cross examination was intended to bring out evidence of collusion betwene libellant and the agents. No collusion whatever was shown. On the evidence, I find that the libellant originally got the stevedoring and similar business of respondent by submitting a bid for the work, and thereafter continued without further submission of bids although other stevedores were seeking to get the business.

A number of references were made in the testimony to the Transatlantic Conference at which an agreement was reached between stevedores and owners and agents of steamships. As it does not appear whether claimant and libellant were parties to any such agreement I have disregarded all reference to same in reaching my conclusion.

Claimant urged before me an alleged fatal nonjoinder of parties libellant. The libel reads, "Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company," etc. It appears that on April 14, 1919, Maxwell Rose and Bertha Rose, his wife, filed in the New York County Clerk's office a certificate acknowledged April 8, 1919, as follows:

"We, Maxwell Rose and Bertha Rose, do hereby certify that we conduct or transact business under the name of the Battery Operating Company."

It also appears that at the time the services were rendered in this case both libellant and his wife were partners in the business
174 conducted under the name Battery Operating Company. Libellant testified that each owned a half interest and that since he actually conducted all the business himself he forgot to tell his proctor of the partnership relation at the time the libel was drawn.

The question presented is whether upon the assessment of damages it is possible to proceed to final decree on the Battery Operating Company items without having the wife joined as a party libellant. In my opinion, the question of non-joinder was waived by respondent's failure to raise it earlier in the proceedings. Rowley on Modern Law of Partnership, pp. 1099 and 1101 as follows:

"Advantage may be taken by demurrer of the fact that a partnership sues by its firm name, if it appears on the face of the pleading that the suit is so brought; or by motion to dismiss; or by a plea of abatement. The defect may be cured by amendment; or waived by

failure to object. And it has been held that objection after judgment is too late. * * * Under the Codes, nonjoinder by a partner as plaintiff should be raised by demurrer, if apparent, by answer; else the objection is deemed waived."

At common law a dormant partner is not a proper or necessary party plaintiff in a suit to enforce a partnership contract. Clark v. Miller, 4 Wend. (N. Y.) 628 10 N. Y. Com. Law Reports, 732; Clarkson v. Carter, 3 Cowen (N. Y.) 84, 8 N. Y. Com. Law Reports, 59.

A similar result has been accomplished under the code by
175 holding that a trustee of an express trust may sue without joining the beneficiaries. Weber v. Columbian Amusement Company, 160 App. Div. 835, 837; Meinhardt v. Excelsior Brewing Company, 98 App. Div. 308, 311. See also Weill v. Paradise, 188 N. Y. S. 287, 290; Secor v. Keller, 4 Duer (N. Y.) 416, to the contrary was expressly overruled in the Meinhardt case.

In several of the cases cited, plaintiffs have been allowed to recover in spite of similar nonjoinder of a partner. The test is whether payment of a judgment recovered by the plaintiff would fully protect the defendant from the claims of third persons. Payment to libellant or satisfaction of final decree when entered would discharge the obligation of the respondent. There is, therefore, no objection to allowing libellant to recover.

In conclusion, from the testimony adduced before me, I find and report that the libellant, doing business under the trade name Battery Operating Company, at the special instance and request of the agents and captain of the above named vessel, provided wharfage, dock space, bulkhead and farm on the south side of Pier B, Jersey City, New Jersey, from July 14 to August 16, 1920, inclusive, electric light service on said pier, and took away refuse from said pier, as shown by Exhibit 1, and that the reasonable value thereof is the sum of $11,857,000 and also from July 27 to August 16, 1920, performed services in tallying, watching and coopering inward cargo from said vessel for which as shown by Exhibit 1A the reasonable, fair value is $3,232.20, and also on August 30 and August 31, 1920, performed
services in tallying and checking outward cargo for said ves-
176 sel for which as shown by Exhibit 1B the reasonable fair value is $75.40.

Also I find and report that the libellant, doing business under the trade name Whitehall Stevedoring Company, at the special instance and request of the agents and captain of the above named vessel, performed services in discharging inward cargo, winchdriving, tiering cargo on dock, trucking cargo to bulkhead and farm and breaking down cargo for delivery, as shown by Exhibit 1C for which the reasonable fair value is $7,209.35, and performed services in bunkering coal and trimming same in bunkers, as shown by Exhibit 1D for which the reasonable fair value is $2,260.16, making a total due the libellant of $24,634.11, together with interest at the rate of 6% per annum from August 31, 1920.

I annex hereto the testimony and exhibits received before me.
Dated, New York, October 18, 1921.

Respectfully submitted, BEN A. MATTHEWS,
Commissioner.

177 *Exceptions to Report of Commissioner.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

SS. "MURMUGAO," Her Engines, Boilers, etc., Respondent.

The respondent herein hereby excepts to the report of Ben A. Mathews, Esq., Commissioner, under the interlocutory decree herein, filed the 20th day of October, 1921, as follows:

1. Because the said Commissioner found that the libellant rendered services and furnished materials to respondent of the reasonable value of $25,794.02.

2. Because the said Commissioner found that the libelant, doing business under the name of the Battery Operating Company, rendered services and furnished materials of the reasonable value of $11,958.35.

3. Because the said Commissioner found that it was possible to proceed to final decree on the Battery Operating Company items without having libelant's wife joined as a party libelant.

4. Because the said Commissioner found that the libelant, doing business under the name of the Whitehall Stevedoring Com-
178 pany, rendered services and furnished materials of the reasonable value of $13,835.67.

5. Because the said Commissioner received in evidence the bills alleged to have been rendered by libelant, no proper basis having been laid for their reception.

6. Because the said Commissioner refused to grant respondent's motions at the close of the hearings to dismiss the claim and reference on the grounds there stated.

7. Because the said Commissioner foreclosed respondent from further cross-examination (page 48).

8. Because the said Commissioner committed errors in the taking of testimony and his rulings thereon as evidenced by the objections and exceptions taken by the claimant as more fully appears in the minutes.

Dated New York, October 25, 1921.

Yours &c., FRANK M. PATTERSON,
Proctor for Respondent.

Office & Post Office Address, 30 Pine Street, Borough of Manhattan, City of New York.

To Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Libelant, and Alexander Gilchrist, Jr., Clerk of the U. S. District Court.

179 *Order Overruling Exceptions.*

United States District Court, Southern District of New York.

MAXWELL ROSE

against

S. S. "MURMUGAO."

LEARNED HAND, *D. J.*:

The same considerations apply here as to the objections argued in the suit in personam. There may be indeed a question whether all the services rendered created maritime liens, but the exceptions do not raise it, and it has not been argued at the bar. If it had been the purpose to present any such considerations specific exceptions setting out the items wrongly allowed were necessary. The Commander in Chief, 1 Wall. 43, 50; The Gayuga, 59 Fed. R. 483, 487.

The exceptions are overruled and final decree entered Nov. 12, 1921.

L. H., *D. J.*

180 *Final Decree.*

At a Stated Term of the United States District Court held in and for the Southern District of New York at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 16th day of November, 1921.

Present: Honorable Learned Hand, District Judge.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

S. S. "MURMUGAO," Her Engines, Boilers, etc., Respondent.

This cause having duly come on to be heard on the pleadings and exceptions filed by the libelant to the answer of the claimant herein, and having been duly argued by advocates for the respective parties, and due deliberation having been had, and the Court having filed its opinion in writing directing that said exceptions to claimant's answer be sustained, and an order having been entered herein on the 17th day of August, 1921, directing that the exceptions filed by the libelant to the answer of the claimant herein be

in all respects sustained, and an interlocutory decree having
181 been entered herein on the 17th day of August, 1921, whereby it was ordered, adjudged and decree- that the libelant herein recover of and from the claimant and its stipulators the damages sustained by the libelant by reason of the matters and things alleged in the libel, with interest and costs, and directing that Ben A. Matthews, Esq., as commissioner, ascertain and compute the amount of libelant's damages and report thereon to this Court, and the said commissioner having filed his report on the 21st day of October, 1921, wherein he found the libelant's damages to be the sum of $25,794.02; and exceptions to the commissioner's report having been filed, and said exceptions having been duly argued, and the Court having filed its opinion in writing overruling the said exceptions and directing that a final decree be entered in favor of the libelant; and the costs of the libelant having been taxed at the sum of $303.55: it is now by the Court

Ordered that the report of the commissioner herein be and it hereby is confirmed; and it is further

Ordered, adjudged and decreed that the libelant herein, Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, have, receive and recover of and from the steamship "Murmugao," her claimant and stipulators, the sum of $25,794.02, the amount of libelant's damages, with interest thereon from the 2d day of September, 1920, amounting to the sum of $1,866.14, together with the sum of $303.55, costs of the libelant as taxed, amounting in all to the sum of $27,-
182 963.71, with interest thereon *n*until paid; and it is further

Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after service of a copy of this decree and notice of entry upon the claimant or his proctors the stipulators on behalf of the claimant cause the engagement of their stipulators to be performed or show cause within four days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

LEARNED HAND,
U. S. D. J.

Consent to Order of Substitution.

United States District Court, Southern District of New York.

MAXWELL ROSE, Libellant,

against

Steamship "MURMUGAO," Respondent.

It is hereby consented that F. Dudley Kohler of 25 Broadway, Borough of Manhattan, City of New York, be substituted in the place and stead of Frank M. Patterson, as Proctor for the
183 respondents in the above entitled action, and that an order to that effect may be entered without further notice.

Dated, New York, November 15th, 1921.

(Signed) FRANK M. PATTERSON,
Proctor for Respondents.
GEORGE S. DUARTE,
Consul General of Portugal.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of November, 1921, before me personally came the above named George S. Duarte, to me known and known to me to be the person described in and who executed the foregoing consent, and he thereupon acknowledged to me that he executed the same, and that he is the Consul General of Portugal.

ROSE ALEXANDER,
Notary Public, New York County.

New York County Clerk's No. 213.
New York Register's No. 3171.
Commission expires March 30th, 1923.

184 *Order of Substitution.*

At a Term of the District Court held in and for the Southern District of New York at the Post Office Building, in the Borough of Manhattan, City of New York, on the 16th day of November, 1921.

Present: Hon. John C. Knox, District Judge.

MAXWELL ROSE, Libellant,

against

Steamship "MURMUGAO," Respondent.

Upon reading and filing the annexed consent of Frank M. Patterson and of George S. Duarte, Consul General of Portugal, in the

State of New York as the lawful representative of the owners of the above named steamship "Murmugao," the respondents herein, who reside and have their place of business in the Republic of Portugal, and on motion of F. Dudley Kohler, it is hereby

Ordered that F. Dudley Kohler of No. 25 Broadway, Borough of Manhattan, City of New York, be and he hereby is substituted in place of Frank M. Patterson, as proctor for the respondents in the above entitled action.

JNO. C. KNOX,
U. S. D. J.

185 *Notice of Appeal.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MORMUGAO," Her Engines, etc., Respondent.

SIRS:

Please take notice that the steamship "Mormugao" claimant in the above entitled action, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from a final decree of this Court, filed and entered on the 16th day of November, 1921, and from each and every part thereof, and also from the interlocutory decree sustaining exceptions, filed and entered in said clerk's office on the 17th day of August, 1921, and from each and every part of said interlocutory decree.

Dated, New York, November 25th, 1921.

Yours, etc.

F. DUDLEY KOHLER,
Proctor for Claimant.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

186 To Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court, Southern District of New York; Kirlin, Woolsey, Campbell, Hickox & Keating, Esqrs., Proctors for Libellant, 27 William Street, New York City.

Assignment of Errors.

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MORMUGAO," Her Engines, etc., Respondent.

The respondent of the Steamship "Mormugao," appellant herein alleges assigns errors to the findings, decision and decrees, of the District Court herein, in the above entitled action as follows:

1. In that it held that the answer of the respondent herein
187 did not state facts sufficient to institute a defense to the allegations in the libel herein.

2. In that it held that by appearing in this action and answering the libel, this respondent waived its claim to immunity to the process of this Court arising out of its Sovereignty.

3. In that it held that by appearing in this action and answering the libel, this respondent had waived any claim that this Court did not have jurisdiction herein over this respondent as a Sovereign Power, or over its Steamship "Mormugao" as being owned and operated by it as that Sovereign.

4. In that it sustained the libellant's exceptions to the respondent's answer herein and directed the entry of an interlocutory decree in favor of the libellant.

5. In that it failed to hold that the respondent as a Sovereign Power or a department of the sovereign government was immune to the process of this Court and that it did not waive any of its rights to suit and immunity for itself or its property or any of its rights of sovereignty by its appearing herein or answering the libel or by any other act.

6. In that it failed to hold that this respondent could properly assert its rights to sovereignty and immunity for itself and its property, to the jurisdiction of this Court at any time during the pendency of this action.

188 7. In that it failed to hold that because the Steamship "Mormugao" was represented to be public property of the Government of the Republic of Portugal, the said steamship was not subject to attachment herein and that the statement of the said process herein should not be executed.

8. In that it failed to hold that because the steamship "Mormugao" was represented to be public property of the Government

of the Republic of Portugal, this Court should not and could not take jurisdiction.

9. In that the Court by directing the entry of an interlocutory decree herein deprived this respondent of its defense of Sovereignty.

10. In that it confirmed the report of the Special Commissioner herein.

11. In that it directed the entry of a final decree herein in favor of the libellant.

12. In that it failed to hold that the defense of sovereignty was a jurisdictional defense which could be asserted at any time and was not waived by a general appearance herein.

13. In that it deprived the respondent of its defense of sovereignty herein.

F. DUDLEY KOHLER,
Proctor for Claimant.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

189 *Stipulation as to Exhibits.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

against

SS. "MURMUGAO," Her Engines, Boilers, etc., Respondent-Appellant.

It is hereby stipulated and agreed that all the exhibits given in evidence at the commissioner's hearing had herein, need not be reproduced in the record herein but may be transmitted in its original form to the Circuit Court of Appeals and may be used by either party on the argument of the appeal with the same force and effect as if said exhibits were included in the transcript of record.

Dated, December 27th, 1921.

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Attorneys for Libellant-Appellee.
F. DUDLEY KOHLER,
Attorney for Respondent-Appellant.

190 *Stipulation as to Record.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

S. S. "MURMUGAO," Her Engines, Boilers, etc., Respondent.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties for the purposes of this appeal.

Dated, New York, —— —, 1921.

F. DUDLEY KOHLER,
Attorney for Claimant-Appellant.
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Appellee.

191 *Clerk's Certificate.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

S. S. "MURMUGAO," Her Engines, Boilers, etc., Respondent.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of December, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEXANDER GILCHRIST, JR.,
Clerk.

192 *Notice of Motion.*

United States Circuit Court of Appeals for the Second Circuit.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship MURMAGAO, Her Engines, Boilers, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant.

SIR:

Please take notice that upon the annexed affidavit of Robert S. Erskine, verified the 5th day of January, 1922, and on the printed record in this cause heretofore filed in this court on or about the 31st day of December, 1921, we shall move this Court at the Court Rooms in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on Monday, the 9th day of
193 January, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard for an order:

1. Dismissing the appeal in this cause or affirming the decree below entered in the office of the Clerk of the United States District Court for the Southern District of New York, on the 16th day of November, 1921, upon the ground that this appeal is without merit as a matter of law, is frivolous and has been taken solely for the purpose of delay;

2. Granting costs to the libelant-appellant and extra damages because of said delay and for such other or further relief as may be just in the premises.

Dated, New York, January 5, 1922.

Yours, etc.,

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Libelant-Appellee.

Office and P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

To F. Dudley Kohler, Esq., Proctor for Claimant Appellant, Office & P. O. Address, 25 Broadway, Borough of Manhattan, City of New York.

194 *Affidavit of Robert S. Erskine.*

United States Circuit Court of Appeals for the Second Circuit.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

PORTUGUESE STEAMSHIP MURMAGAO, Her Engines, Boilers, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant.

STATE OF NEW YORK,
County of New York, ss:

Robert S. Erskine, being duly sworn, says:

1. I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libelant-appellee herein, and have had entire charge of this action since its inception.

195 2. This is an appeal from a final decree in admiralty entered in the office of the United States District Court for the Southern District of New York on the 16th day of November, 1921, in favor of the libelant in the sum of $27,963.71.

3. The libel was filed on or about the 1st day of December, 1920, to recover the sum of $25,794.02 for services rendered by the libelant in connection with the discharging and loading of the steamship Murmagao at Pier B, Jersey, for the period of August 8 to September 3, 1920. The vessel was released from arrest on the filing of the usual stipulation for value (fol. 35). A notice of appearance was also filed in this suit and in the companion suit against the Transportes Maritimos do Estado, owner of the vessel. No mention was made either in the bond or appearance of any claim that the owner objected to the court below taking jurisdiction over it or over the suit by reason of such owner being a foreign sovereign power (fols. 34, 35).

4. Claimant filed its answer on or about the 24th day of December, 1920, and for the first time alleged as a defense that the steamship Murmagao was a Portuguese vessel and was owned and operated by Transportes Maritimos do Estado which was alleged to be a department of the sovereign foreign government of Portugal; that the matters alleged in the libel relate to the management of the said vessel outside the jurisdiction of the United States, settlement
196 of which should be left to the Portuguese Consul at the port of New York. In the said alleged defense the "respondent" objected and protested to the assumption of jurisdiction by the District Court and alleged that the said vessel was owned and operated by the sovereign foreign government of Portugal and cannot be sued in the courts of the United States without its consent (fols. 17

18). Claimant did not deny that the services had been rendered by the libelant and that the amount due had not been paid.

5. Exceptions were duly filed to the answer on the ground that the answer did not state facts sufficient to constitute a defense and that by appearing generally in the cause and answering the libel any claim that the District Court did not have jurisdiction over the parties to the cause was waived (fols. 25-27 inc.).

6. The exceptions were argued before Honorable John C. Knox, District Judge, together with the exceptions in the suit of Rose against Transportes Maritimos do Estado. Judge Knox sustained the exceptions and his opinion is printed at pages 11-14 of the record.

7. An interlocutory decree was entered on the 17th day of August, 1921, and the question of the amount of damages was referred to Ben A. Matthews, Esq., Commissioner (record, pp. 17-18). Testimony on the question of damages was taken before the Com-
197 missioner, who reported the amount due to the libelant to be the sum of $24,634.11, with interest. The claimant offered no evidence before the commissioner to dispute libelant's right to payment for services rendered, on the merits (fol. 227). The respondent filed exceptions to the report (fols. 229-234 inc.). The exceptions were argued before Honorable Learned Hand and overruled (fols. 235-237) and a final decree was thereupon entered (Record, p. 80-82 inc.)

8. Claimant served notice of appeal on November 26, 1921, and filed assignments of error on December 5, 1921. The transcript of record was filed in the office of the Clerk of this Court on or about the 31st day of December, 1921.

9. The assignments of error which are printed on pages 86-88 inc. of the record raise only the question of jurisdiction and the question whether claim of immunity can be inserted after a general appearance. There are not any errors assigned in connection with the overruling of the exceptions to the commissioner's report. The natural inference, therefore, is that the exceptions to the commissioner's report were filed solely for the purpose of delay.

10. The contentions raised by the appellant are without merit, and it would appear that the appeal is frivolous and interposed solely for the purpose of delay. In the parallel case of Tietjen & Lang Drydock Company against Sao Vicente this Court, in
198 December, 1921, passed upon the same contentions as appellant attempts to raise on this appeal. In that case, this Court dismissed the appeal. These two cases are entirely similar.

Wherefore, I respectfully ask that an order be made dismissing this appeal or affirming the judgment of the Court below with costs and also for extra damages on the ground that this appeal has been interposed solely for the purpose of delay and that libelant may

have such other or further relief as the justice of the cause may require.

ROBERT S. ERSKINE.

Sworn to before me this 5th day of January, 1921.

WM. O. GODDARD,
Notary Public, Kings County.

Certificate filed in New York County.

199 *Order Dismissing Appeal.*

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 19th day of January, 1922.

Present:

Honorable Henry Wade Rogers,
Honorable Martin T. Manton,
Honorable Julius M. Mayer,
Circuit Judges.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

against

Sheamship MURMAGAO; TRANSPORTES MARITIMOS DO ESTADO, Claimant.

Libelant-appellee having moved this Court for an order dismissing the appeal in this cause or affirming the decree entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 15th day of November, 1921,
200 and granting costs to the libelant-appellee and extra damages for delay; and said motion having come on to be heard on the 9th day of January, 1922, on a notice of motion and affidavit of Robert S. Erskine annexed thereto, verified the 5th day of January, 1922, with proof of service thereof upon the proctor for the claimant-appellant, and on the printed transcript of record from the District Court of the United States for the Southern District of New York heretofore filed in this Court on or about the 31st day of December, 1921, and the proctor for the appellant having, on said 9th day of January, 1922, applied in open court for a stay of the argument of said motion pending re-argument of a similar motion in the suit of Tietjen & Lang Dry Dock Company against the steamship Sao Vicente, and having stated in open court that the only defense involved in this appeal was the same as that involved in the appeal in the said suit of Tietjen & Lang Dry Dock Company, and the Court having heard the re-argument in said suit and having, on

the 13th day of January, 1922, affirmed its decision thereon affirming the decree of the District Court.

In consideration whereof, it is now

Ordered, adjudged and decreed that the motion of the libelant-appellee be granted, and that the decree of said District Court be and it hereby is affirmed with costs.

H. W. R.,
M. T. M.,
C. J.

201 *Notice of Settlement.*

United States Circuit Court of Appeals for the Second Circuit.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

against

Steamship MURMAGAO, TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

SIR:

Please take notice that the foregoing order will be presented to one of the Judges of this Court at the office of the clerk of this Court, in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 18th day of January, 1922, at 11 o'clock in the forenoon for settlement and signature.

Dated, January 14, 1922.

Yours, etc.,

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant-Appellee.

To F. Dudley Kohler, Esq., Proctor for Claimant-Appellant.

202 *Opinion, Mayer, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

v.

Steamship SAO VICENTE, Her Engines, etc.,

TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

MAXWELL ROSE, Doing Business as Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

v.

Steamship MURMUGAO, Her Engines, etc.,

TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

203 MAXWELL ROSE, Doing Business as Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

v.

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

Before: Rogers, Manton and Mayer, Circuit Judges.

Crowell & Rouse, proctors for Tietjen & Lang, Libellant-Appellee.

F. Dudley Kohler, proctor for Transportes Maritimos do Estado, Claimant-Appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Maxwell Rose, etc., Libellant-Appellee.

F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Maxwell Rose, etc., Libellant-Appellee.

204 F. Dudley Kohler, proctor for Transportes, Respondent-Appellant.

MAYER, *Circuit Judge:*

The first motion made in this group of cases was a motion on behalf of libelant-appellee in the case of the Sao Vicente to dismiss the appeal.

This motion was granted and we filed a brief memorandum reading:

"This motion to dismiss is granted. The sovereign immunity can be waived and has been waived in this case."

Thereafter, claimant-appellant petitioned for a rehearing, the petition was granted, a rehearing was had and the court adhered to its previous decision. It was agreed between the proctors that all the

cases should follow our decision in the Sao Vicente case. After our decision on rehearing our attention was called to the opinion of the Appellate Division of the Supreme Court for the First Department in De Simone against Transportes Maritimos do Estado and, as it was suggested that our decision was not in harmony with that of the learned Appellate Division, we concluded to point out the views entertained by us more fully than we did our brief memorandum.

In the Sao Vicente case, the libel was brought by a New Jersey corporation engaged in the business of ship repairing and having its shipyard at Hoboken. The libel, which was verified April
205 14, 1921, alleged that between March 25th and April 14, 1921, at the port of New York, libelant, at the instance and request of the S. S. "Sao Vicente," its officers, etc., furnished materials and supplies in the form of work, labor and services in docking and repairing the steamship amounting in all to $69,000 and that no part of this amount had been paid. Libellant prayed that the usual process should issue. After the vessel had been libelled, the claim of the owner was filed in usual form. It read:

"And now, Transportes Maritimos do Estado, owner of the Steamship "Sao Vicente," etc., intervening for its interest in the said Steamship "Sao Vicente," etc., appears befor- this Honorable Court and makes claim to the said steamship, &c., as the same are under attachment in this Court * * * and the said Transportes Maritimos do Estado avers that it was in possession of the said Steamship "Sao Vicente" at the time of the issuing of process herein and that it is the true and bona fide owner of the said Steamship "Sao Vicente;" and that no other person is the owner thereof; wherefore it prays to defend accordingly.

TRANSPORTES MARITIMOS DO ESTADO,
By C. B. RICHARDS & CO.
LEONARD W. SIMMONS,
A Partner."

206 This claim was verified by Simmons and acknowledged before a notary, the acknowledg-ment reading, in part:

"he acknowledged to me that he executed the same for and on behalf of said firm, as agent for Transportes Maritimos do Estado."

The stipulation for value filed the same day was likewise in usual form providing in the condition clause

"if the claimant herein and American Surety Company of New York, of 100 Broadway, Borough of Manhattan, in the City of New York, and by occupation a Surety Company, the stipulation undersigned, shall abide by all orders of the Court, interlocutory or final and pay the amount awarded by the final decree rendered by this Court, or by

any Appellate Court if an appeal intervene, with interest then this stipulation to be void, otherwise to remain in full force and virtue."

TRANSPORTES MARITIMOS DO ESTADO.
C. B. RICHARDS & CO.,
Agents,
By LEONARD W. SIMMONS,
A Partner."

It is not disputed that the usual stipulation for costs was also filed. Upon filing the claim of the owner and the stipulation for value and the stipulation for costs, the owner procured the release of the
207 vessel from arrest and the vessel is no longer in these waters and hence is no longer in this jurisdiction.

It will be noted that up to this time there was not even the remotest suggestion that the vessel belonged to a foreign sovereign. On May 27, 1921, an answer was verified by Jose Rocha Prista, who swore that he was the Vice Consul-General for the Government of Portugal with an office in the City of New York and that the vessel "as I am informed and believe, is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government * * * the sources of my information and the grounds of my belief as to the matter stated to be alleged upon information and belief are records at the Port of New York and communications received from the agents of the Steamship 'Murmagoa.'

The reason this verification is not made by the respondent is that the respondent is owned by the Transportes Maritimos do Estado, a Department of the republic of Portugal, and is not within the jurisdiction of the United States."

The answer alleged inter alia.

"That the Steamship 'Sao Vicente' is a Portuguese vessel flying the flag of Portugal, owned and operated by Transportes Maritimos do Estado, which is now and at the times mentioned in the libel was a Department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with
208 the United States * * * and that said vessel is engaged in the public service of Portugal, and that the matters set forth in said libel relate to the management, control and operation of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants' Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

Respondent objects to, and protests against the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by Transportes Maritimos do Estado, a Department of the sovereign foreign government of Portugal as aforesaid, and that it cannot be sued in any of the Courts of the United States without its consent and that this action is in substance and effect an action

against the government of Portugal, and as such is not maintainable against this respondent."

To this answer, libelant duly excepted, the exceptions were sustained by Judge Knox, the usual interlocutory decree was entered and later a special commissioner reported that a stipulation as to damages had been agreed to by the respective proctors and on the basis of that stipulation the special commissioner ordered that the amount due libelant was $67,955.69 with interest from April 12, 1921.
209 Thereafter on October 4, 1921, a routine final decree in usual form was entered.

1. Under the Carlo Poma case, 255 U. S., 219, we think that the decree was not appealable to this court.

2. In any event, the jurisdictional question sought to be raised by the answer was not properly raised. The Vice Consul General does not assert that the foreign sovereign government owns the vessel but merely alleges that it is owned by a department of the sovereign foreign government and so far as this record discloses there is nothing in the answer to show that the ownership of the department is the ownership of the sovereign itself. Indeed, the Vice Consul General does not make any assertion on behalf of the Republic of Portugal, but merely states in his affidavit that he is informed and believes that the vessel is owned by a department of the government of the Republic of Portugal and that this information according to the Vice Consul General's affidavit was obtained not from the sovereign under whom he is serving but from some undescribed records at the Port of New York and communications from the agents of another steamship which we happen to know from the other cases is alleged to be owned by this same department.

Even if it were to be held notwithstanding The Pesaro, 255 U. S., 216, that the question of jurisdiction could be raised by the Vice Consul General, it is not properly raised upon this record.

210 3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance. In Beers v. State of Arkansas, 20 How. 527, in speaking of the consent of the State of Arkansas, the court said:

"And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

But this expression must be read in connection with the particular facts of that case, as is illustrated by the following extract from Clark v. Barnard, 108 U. S., 436, at page 447:

"The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States.

211 We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 103 U. S. 458, where the States *expressed* declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court."

212 The underlying principle of Clark v. Barnard has been consistently followed.

Gunter v. Atlantic Coast Line R. R. Co., 200 U. S., pp. 284-289;
Porto Rico v. Ramos, 232 U. S., 627;
Richardson v. Fajardo Sugar Co., 241 U. S., 44;
Veita et al. v. Fortuna Estates, 240 F. R., 256, 262.

As succinctly put by Mr. Justice McKenna in the Ramos case, supra, "The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

The two other cases while differing in some details are the same in principle on the questions of appealability and jurisdiction as the Sao Vicente case.

The motions to dismiss the appeals are granted.

213 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing

pages, numbered from 1 to 112 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Maxwell Rose, doing business, etc., Libellant-Appellee, against S. S. Murmagoa, her engines, etc., Transportes Maritimos Do Estado, Claimant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of February in the year of our Lord One Thousand Nine Hundred and twenty two and of the Independence of the said United States the One Hundred and forty-sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

214 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Steamship "Mormugao," her engines, boilers, etc., is appellant, and Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and, we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

215 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

216 [Endorsed:] File No. 28,731. Supreme Court of the United States, October Term, 1921. No. 776. Transportes Maritimos do Estado, Claimant, etc., vs. Maxwell Rose, etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1922. William Parkin, Clerk.

217 Supreme Court of the United States, October Term, 1921.

No. 776.

TRANSPORTES MARTIMOS DO ESTADO, Claimant, etc.,

against

MAXWELL ROSE, etc.

It is hereby stipulated and agreed by and between the proctors for the parties hereto that the record already certified and filed in the office of the Clerk of the United States Supreme Court in the above entitled cause be taken as the return to the Writ of Certiorari issued herein.

Dated, New York City, April 10th, 1922.

F. DUDLEY KOHLER,
Proctor for Appellant.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctor- for Appellee.

218 [Endorsed:] Supreme Court of the United States. Transportes Maritimos do Estado, Claimant, etc., vs. Maxwell Rose, etc. No. 776. October Term, 1921. Copy. Stipulation. F. Dudley Kohler, Proctor for Claimant, 25 Broadway, (Cunard Building), New York City.

219 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York April 22n-, 1922.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

220 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. S. S. "Murmugao" v. Maxwell Rose. Return to Certiorari.

221 [Endorsed:] File No. 28731. Supreme Court U. S. October Term, 1921. Term 776. Transportes Maritimos do Estado, &c., Petitioner, vs. Maxwell Rose, &c. Writ of Certiorari and Return. Filed April 26, 1922.

222 United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

Statement.

Libel Dec. 1, 1920.
Answer Dec. 24, 1920.
Exceptions to Answer May 12, 1921, and Notice of Argument.
Proposed Order Sustaining exceptions Aug. 2, 1921.
Order Sustaining Exceptions Aug. 17, 1921.
Interlocutory Decree Aug. 17, 1921.
Notice of Reference Sept. 16, 1921.
Notice of Filing Report of Commissioner Oct. 20, 1921.
Exceptions to Report of Commissioner Oct. 26, 1921.
Notice of Argue, Exceptions Oct. 26, 1921.
Opinion Nov. 12, 1921.
Order Substitution Nov. 16, 1921.
Final Decree Nov. 17, 1921.
Notice of Appeal Nov. 26, 1921.
Notice of Appeal Nov. 26, 1921.
Assignment of Errors, Dec. 5, 1921.

223 *Libel.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel of Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, against the Transportes Maritimos do Estado, in a cause of contract, civil and maritime, alleges on information and belief as follows:

First. The libelant is a resident of the City of New York (Kings County), and State of New York, and is in the business of furnishing wharfage, stevedores, clerks, checkers, trimmers, tallymen, etc., to steamships and other vessels in the port of New York and is engaged in said business under the trade names of Battery Operating

Company with an office at 2704 Bedford Ave., Brooklyn, N. Y., and Whitehall Stevedoring Company with an office at No. 15
224 Whitehall Street, New York City.

Second. On information and belief, the above named respondent is a corporation existing under and by virtue of the laws of the Republic of Portugal, and is not now within this district, nor are any officers of the said corporation within this district, but the said respondent has now or will have during pendency of process herein within this district and the jurisdiction of this Honorable Court certain property, to wit, the Portuguese steamship "Murmugao." The libelant alleges further on information and belief that at all the times hereinafter mentioned the respondent was and still is the owner of the steamship "Cunene."

Third. The libelant, during the period from about July 14 to August 31, 1920, at the request of the respondent and its agents, furnished certain services to the respondent's vessel "Cunene" in the nature of wharfage, stevedores, clerks, checkers, watchmen, coopers, tallymen, etc., in connection with the discharge and loading of the said vessel on the south side of Pier B, Jersey City. The aforesaid services were necessary to the said vessel to enable her to discharge and load cargo.

Fourth. The reasonable value of the aforesaid services amounted in all to the total sum of $24,634.11. Bills covering the various services rendered as aforesaid and amounting in all to the aforesaid total were presented to and signed by the captain of the steamship "Cunene" as evidence that the aforesaid services were ren-
225 dered and that the charges were correct. The charges for said services constitute a lien upon the said steamship by reason of the nature of the services rendered by the libelant.

Fifth. Although payment of the aforesaid sum has been repeatedly demanded by the libelant from the respondent and its agents, payment has at all times heretofore been refused and the whole of the aforesaid amount is still due and owing to the libelant from the respondent.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the respondent herein, citing it to appear and answer on oath all and singular the matters aforesaid; and providing that said respondent cannot be found within this district, then that all property, goods, rights, chattels, etc., belonging to the said respondent and within this district and the jurisdiction of this Honorable Court and particularly the steamship "Murmugao," be attached to the sum of $24,634.11, the sum sued for in the libel herein, together with interest thereon

from August 31, 1920, and the costs and disbursements of the libelant herein; and that the Court will order, adjudge and decree that the said respondent pay to the libelant the damages sustained by the libelant as aforesaid, together with interest and costs and disbursements of this suit; and that the Court will order the property of the respondent which may be attached under this libel condemned and sold to pay the same; and that the Court will grant to the libelant such other and further relief as may be just in the premises.

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Libelant.

Office & P. O. Address, 27 William Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Maxwell Rose, being duly sworn, says: I am the libelant herein. The foregoing libel is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to the same I believe it to be true.

MAXWELL ROSE.

Sworn to before me this 1st day of December, 1920.
[SEAL.] HARRY D. THIRKIELD,
Notary Public, New York County.

Clerk's No. 45, Register's No. 1150.
Certificate filed in Kings Co.
Clerk's No. 13, Register's No. 1008.

Answer.

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

In Admiralty.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of Transportes Maritimos do Estado to the libel in an alleged cause of contract, civil and maritime, brought by Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, respectfully shows to this Court and alleges upon information and belief as follows:

I. Respondent denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph marked "First" of the libel.

II. Respondent denies the truth of the allegations contained in the paragraph marked "Second" of the libel, except that
228 respondent admits that it is not now within this district, but that the said respondent has now or will have during the pendency of process hereunder within this district certain property, and respondent admits that it was and still is the owner of the steamship "Cunene."

III. Respondent denies the truth of the allegations contained in paragraph marked "Third" of the libel except that it admits that the libelant, during the period fro mabout July 14 to August 31, 1920, at the request of the then agents of the respondent furnished certain services to the said "Cunene."

IV. Respondent denies the truth of the allegations contained in the paragraphs marked "Fourth" and "Sixth" of the libel.

V. Respondent denies the truth of the allegations contained in paragraph marked "Fifth" of the libel, except that it admits that payment of the sum alleged has been demanded by the libelant from the respondent's agents and that payment thereof has been refused.

VI. Further answering the libel herein, and as a separate, distinct and complete defense thereto, respondent alleges, upon information and belief:

1. That the steamship "Cunene" is a Portuguese vessel flying the flag of Portugal, and is owned and operated by the respondent, Transportes Maritimos do Estado. That the respondent is a depart-
ment of the sovereign foreign government of Portugal, a
229 government now at peace with the United States and allied with the United States in the late world war, and the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

2. Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a department of the sovereign foreign government of Portugal as aforesaid and that it cannot be sued in the Courts of the United States without its consent.

Wherefore, respondent prays that the libel herein be dismissed, with costs to the respondent as against the libelant, and that the Court grant to the respondent such other and further relief as the justice of the case may require.

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

230 UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Jose Rocha Prista, being duly sworn, says:

I am the acting Consul General for the government of Portugal with an office in the City of New York in the Southern District of New York. The respondent, as I am informed and believe, is a department of the Republic of Portugal, a sovereign foreign government.

I have read the foregoing answer and know the contents thereof; that the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief as to the matters stated to be alleged upon information and belief are records at the Port of New York kept by respondent and communications received from respondent's agents.

The reason this verification is not made by the respondent is that the respondent is a department of the Republic of Portugal and is not within the jurisdiction of the United States.

JOSE ROCHA PRISTA.

Sworn to before me this 24th day of December, 1920.

E. H. M.,
Notary Public, New York County, No. 258.

New York County Register's No. 2325.
Commission expires March 30, 1922.

231 *Exceptions to Answer.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

The libelant hereby excepts to the answer filed herein by or on behalf of the respondent herein upon the ground that:

1. Said answer does not state facts sufficient to constitute a defense to the matters alleged in the libel; and

2. By appearing generally in the cause and answering the libel any claim of immunity and any claim that the Court has not jurisdiction over the parties to this cause has been waived.

Dated, New York, May 11, 1921.

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Libelant.

232 *Notice of Exceptions.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

SIR:

Please take notice, that the foregoing exceptions will be brought on for argument at a stated term of this Court for the hearing of motions to be held at the Court Rooms in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 20th day of May, 1921, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated, New York, May 11, 1921.

Yours, etc., KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant.

To Frank M. Patterson, Esq., Proctor for Respondent, 30 Pine Street, New York City.

233 *Opinion of Judge Knox.*

United States District Court, Southern District of New York.

A75—220.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

A75—III—219.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

Portuguese Steamship "MURMAGAO," Her Engines, etc., Respondent.

Kirlin, Woolsey, Campbell, Hickox & Keating (Robert S. Erskine, advocate), for libellant;

Frank M. Patterson (Howard C. Luke and M. Mackenzie, with him on the brief), for respondent.

The first of the above-mentioned suits is in personam for services rendered the steamship "Cunene," and process with clause of foreign attachment has issued. Under such process the steamer "Murmagao" was seized; the second is in rem against the same
234 "Murmagao," and appropriate process went forth thereunder and was executed.

Upon behalf of the respondent and owner and claimant of the "Murmugao" a motion of appearance was filed, which reads as follows:

"Please take notice that the respondent above named hereby appears in the above-entitled suit, and that I am retained as proctor for it herein.

Dated, December 13, 1920.

Yours, etc., FRANK M. PATTERSON, ETC."

In both suits the "Murmugao" was released upon her owner and claimant filing a proper bond to respond to any decree that might be rendered. The bond was in the usual form and without reservation as to any lack of jurisdiction in this court.

Some days after these proceedings respondent filed its answers, wherein it is admitted that libellant furnished certain services to the "Cunene" and "Murmugao." Proof, however, will be required to ascertain the extent and value thereof.

In the answer to each libel it is set up, by way of a separate, complete and distinct defense, that each of the vessels to which libellant rendered services is a Portugese vessel flying the flag of Portugal, and is owned and operated by respondent, Transportes Maritimos do Estado. That the respondent is a department of the sovereign
235 foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchant Shipping Acts and international comity, the settlement of these matters should be left to the Portugese Consul at the Port of New York.

Respondent objects and protests to the assumption of jurisdiction by this Court and alleges that it is a department of the sovereign foreign government of Portugal and that it cannot be sued in the courts of the United States without its consent.

Libellant in turn has excepted to the answers upon the ground (1) that they do not state facts sufficient to constitute a defense, and (2) that by appearing generally and answering the libel any claim of immunity and any claim that this court has no jurisdiction over the parties to these causes has been waived.

KNOX, *D. J.*:

There can be no question but that respondent's appearance was general for if a restricted appearance is intended it must be accompanied by some statement to that effect.

4 Corpus Juris, 1918, and cases there cited.

In this case there was no suggestion prior to the coming in of the answers to the libels that Transportes Maritimos do Estado was a governmental agency of Portugal or had any connection therewith.

Respondent came into court to have its property released
236 from arrest, and by so doing obtained that benefit; and now, having failed to suggest that any claim of the vessel's being immune would be raised, it should now, I think, not be permitted to litigate the alleged sovereign character of the "Murmagao."

In view of the somewhat uncertain state of the law as to the status of government owned vessels when operated for commercial purposes, as indicated by The Pesaro, U. S. Supreme Court, February 28, 1921, it is by no means certain that the action taken by the respondent was inadvisable. Had the "Murmagao" asserted her alleged immunity at the time of arrest, it is well within the range of possibility that opposition, entitled to judicial recognition, would have been interposed to her departure until the question of the Court's jurisdiction was determined. In such event the delay to respondent might have been of a serious character.

But, be this as it may, as I view the doctrine of immunity of sovereigns from suits such as these, it is not so sacred as to require its application unless the sovereign insists upon its immunity at the very inception of a given litigation.

The Supreme Court has held in Richardson, etc. v. Fagardo Seegar Co., 241 U. S. 44, that a government may waive its sovereign attributes and I hold that in so far as the present respondent possesses only right of immunity it has waived the same.

I admit that my conclusion is not to be reconciled with that of Judge Manton in Simone v. Transportes Maritimos do Estado, decided March 16, 1921. It does seem to be, however, that so long as a distinction is recognized between general and special appear-
237 ance such distinction must be given its logical effect.

Exceptions sustained.

August 1, 1921.

J. M. C. KNOX,
U. S. District Judge.

Order of Judge Knox Sustaining Exceptions.

At a Stated Term of the United States District Court held in and for the Southern District of New York at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of August, 1921.

Present: Honorable John C. Knox, District Judge.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

The libelant herein having filed exceptions to the answer filed by the respondent herein on the following grounds:

"1. Said answer does not state facts to constitute a defense to the matters alleged in the libel;

238 "2. By appearing generally in the cause and answering the libel any claim of immunity and any claim that the Court has not jurisdiction over the parties in this cause has been waived";

and said exceptions having duly come on to be heard before this Court at a Stated Term thereof for the hearing of motions, and having been duly argued by advocates for the respective parties, and due deliberation having been had, and the Court having filed its opinion in writing directing that said exceptions be sustained, it is

Now, on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libelant

Ordered that the exceptions filed by the libelant herein to the answer filed by the respondent be and the same hereby in all respects sustained.

JNO. C. KNOX,
U. S. D. J.

239 *Interlocutory Decree.*

At a Stated Term of the United States District Court held in and for the Southern District of New York at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 17th day of August, 1921.

Present: Honorable John C. Knox, District Judge.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

This cause having duly come on to be heard on the pleadings and exceptions filed by the libelant to the answer of the respondent herein, and having been duly argued by advocates for the respective parties, and due deliberation having been had, and the Court having filed its opinion in writing directing that said exceptions to respondent's answer be sustained, and an order having been entered herein on the 17th day of August, 1921, directing that the exceptions filed by the libelant to the answer of the respondent herein be in all respects sustained, it is now on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libelant.

240 Ordered, adjudged and decreed that the libelant herein have, receive and recover of and from the respondent and its stipulators the damages sustained by the libelant by reason of the matters and things alleged in the libel, with interest and costs; and it is further

Ordered that it be referred to Ben A. Matthews, Esq., Commissioner, to ascertain and compute the amount due the libelant and to report thereon to this Court with all convenient speed.

JNO. C. KNOX,
U. S. D. J.

Notice of settlement of the foregoing decree is hereby waived.

FRANK M. PATTERSON,
Proctor for Respondent.

241 *Testimony.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Name- of Battery Operating Co. and Whitehall Stevedoring Co., Libellant,

against

TRANSPORTES MARITIMOS DE ESTADO, Respondent.

Before Benjamin A. Matthews, Esq., Special Commissioner.

New York, No. 2 Rector Street,
September 23rd, 1921.

Appearances:

Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., Proctors for Libellant; Robert S. Erskine, Esq., of Counsel.

Frank M. Patterson, Esq., Proctor for Respondent, Howard C. Lake, Esq., of Counsel.

MAXWELL ROSE, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Rose, did you render stevedoring services to the "Cunene" during July and August, 1920?

A. Yes, sir.

242 Q. Were those services rendered under the same circumstances as the services later rendered to the Murmugao?

A. Yes, sir.

Q. Are these the bills for those services (showing witness)?

A. Yes, sir.

Q. Did you see the work done personally?

A. Yes, sir, from the start to the finish.

Q. When the bills were presented were they signed by the Captain of the Cunene?

A. Yes, sir.

Q. Was any objection raised by him at the time?
A. No, sir.
Q. Or Roderick & Rumsey, the agents?
A. No, sir.
Q. Do you know of your own knowledge that the work set forth in these bills was done?
A. Yes, sir.
Q. And the charges are correct?
A. Yes, sir.
Q. And do you know if these rates as charged were the proper reasonable and customary going rates obtaining at that time?
A. Yes, sir.

Mr. Erskine: If the Commissioner please, I offer these bills in evidence.
Mr. Patterson: I reserve all objections and motions as to the reception in evidence of these bills until next Monday.
The Commissioner: We will now adjourn this case to next Monday at the same time as the other one.

(Whereupon an adjournment was taken to Monday, September 26th, 1921, at 12 o'clock noon.)

243 United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Name- of Battery Operating Co. and Whitehall Stevedoring Co., Libellant,

against

TRANSPORTES MARITIMOS DE ESTADO, Respondent.

Before Benjamin A. Matthews, Esq., Special Commissioner.

New York, No. 2 Rector Street,
September 26, 1921.

Appearances:

Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., Proctors for Libellant; Robert S. Erskine, Esq., of Counsel.
Frank M. Patterson, Esq., Proctor for Respondent; Howard C. Lake, Esq., of Counsel.

MAXWELL ROSE resumed the stand.

Direct examination continued.

By Mr. Erskine:

Q. Mr. Rose, how many years have you been engaged in the stevedoring business?
A. Twenty years.
244 Q. How long have you been operating your own business, approximately?

A. Eight years.

Q. You have testified at a prior hearing that you rendered services to the "Cunene" in July and August, 1920; at whose request did you come to furnish those services in the first place?

A. At the request of the agents, Roderick & Rumsey.

Q. In a general way, what was the nature of those services?

A. General stevedoring, discharging, loading and coaling, as well as engaging a berth for the vessel; clerking, checking, coopering and watching.

Q. So that you had charge of all the operations and arrangements in connection with loading and coaling?

A. Yes, sir.

Q. Did you personally supervise the work?

A. Yes, sir.

Q. Do you know that it was done of your own knowledge?

A. Yes, sir.

Q. Did the master of the steamer at any time object to the items on your bills as presented?

A. No, sir.

Q. Did Roderick & Rumsey ever raise any objection as to those bills on the "Cunene"?

A. No, sir.

Q. In accordance with your experience as a stevedore did you keep yourself informed as to the going rates from time to time in the Port of New York?

A. Yes, sir.

Q. State how your rates are charged against "Cunene" compared with the customary, going rates at that time?

A. The rates as a rule, vary somewhat, but not to any great degree; by that I mean one stevedore makes a charge of one price and another stevedore's charge or charges may be higher and another stevedore may be lower, but we always try and keep our charges within the standard rate.

Q. Were the rates you charged fair, going rate or rates on the steamer "Cunene"?

A. Yes, sir.

Q. Were there any items of services for which you had billed the "Cunene" in the bills which are in evidence which were unnecessary in the performance of the work in which you were engaged?

A. None whatsoever.

Q. Have you been paid any part of those bills which have been offered in evidence?

A. On the steamship "Cunene," yes, three accounts.

Q. I am talking about these bills in evidence?

A. Oh, no, sir.

Mr. Erskine: That is all.

Mr. Patterson: Do you rest with this evidence with this witness?

Mr. Erskine: Yes.

The Commissioner: I have not passed on these exhibits you offered in evidence yet.

Mr. Patterson: If the Commissioner please, we object to the reception in evidence at this time of these bills, for the reason that a proper basis has not been laid for their reception in evidence.

Mr. Erskine: You are referring to the "Cunene" bills?

Mr. Patterson: Yes, sir.

The Commissioner: Well, they will be admitted, and an exception allowed.

Mr. Patterson: Yes, I take an exception to your Honor's ruling. Does the libellant rest?

Mr. Erskine: Yes, sir.

246 Cross-examination:

By Mr. Patterson:

Q. Mr. Rose, I ask you if this is your signature to that document (showing witness)?

A. Yes, sir.

Q. And is that your wife's signature, Bertha Rose, to that document?

A. Yes, sir.

Q. And that document was filed by you on April 14, 1919, in the office of the Clerk of the County of New York?

A. Yes, sir.

Q. The instrument is acknowledged on April 8th by both yourself and your wife, Bertha Rose—April 8, 1919—by both yourself and Bertha Rose, and before A. F. Roderick, Notary Public?

A. Yes, sir.

Q. And A. F. Roderick is the senior member of the firm of Roderick & Rumsey?

A. He is.

Mr. Patterson: If the Commissioner please, I offer that in evidence.

Mr. Erskine: I object to that exhibit, for the reason that no ground is stated by counsel for the respondent for the reception of it in evidence; and I submit it has no bearing here, no bearing on the only question now before the Court, namely, the question of damages.

Mr. Patterson: I may say in answer to that, your Honor, that the order provides that you are to find the amount due Maxwell Rose, and if you will look at that certificate you will see.

Mr. Erskine: The libellant has been granted a decree for damages referred to in the libel, and if you are raising the point that there has been a non-joinder of proper party, I submit there
247 is no such practice in admiralty whereby that question can be considered on a reference to compute damages.

The Commissioner: What I shall do now will be to incorporate this paper in the record as part of the record and to be passed upon as I may later determine.

The Witness: Bertha Rose is my wife.

The Commissioner: Suppose you read this into the record.

Mr. Patterson: Yes. I will read it in. Just let the record show that counsel for the respondent reads the following certificate into the record:

"STATE OF NEW YORK,
"County of New York, ss:

"We, Maxwell Rose and Bertha Rose, do hereby certify that we conduct or transact business under the name of the Battery Operating Company.

"We further certify the true or real full name- of the persons conducting or transacting the same, are as follows:

"Names.	P. O. Addresses.
"Maxwell Rose	261 Broadway, New York City.
"Bertha Rose	261 Broadway, New York City.

"(Signed) MAXWELL ROSE.
"(Signed) BERTHA ROSE.

248 "STATE OF NEW YORK,
"County of New York, ss:

"On this 8th day of April, 1919, before me personally appeared Maxwell Rose and Bertha Rose, to me known and known to me to be the individuals described in and they executed the foregoing certificate, and they thereupon duly acknowledged to me that they executed the same.

"(Signed) A. F. RODERICK,
"Notary Public, Kings County, N. Y., No. 44.

"Certificate filed in N. Y. County, 188."

Now, endorsed on the back of this certificate is the following:

"Certificate of Maxwell Rose and Bertha Rose, conducing the business under the name of the Battery Operating Company. Filed April 14, 1919. New York County Clerk's Office."

The Commissioner: Let the record show that it is understood that this exhibit is copied physically right into the stenographer's minutes, the same being admitted in evidence, and also it is understood that it shall be received and admitted as the original without holding the man from the County Clerk's office here any longer.

Mr. Patterson: Yes.

Q. Mr. Rose, with reference to this work alleged to have been done on the steamship "Cunene," you have testified that you
249 gave personal supervision to this entire job; is that right?
A. That is true.
Q. How many men did you employ in and about this work?
A. At this time it would be very hard for me to say exactly.

Q. Well, your bill would show, would it not?
A. My bill?
Q. Yes.
A. Altogether?
Q. Yes, on this job.
A. You mean from start to finish?
Q. Yes, from which you are rendering the bill; how many men, approximately?
A. I canot say until I figure it up. The total altogether from start to finish?
Q. Yes.
A. Oh, in the neighborhood of about, say, from about 2,500 to 3,000 men.
Q. You don't mean that, Mr. Rose, do you, that you employed 2,500 to 3,000 different men on this job?
A. Not daily.
Q. Well, I mean how many different men, how many different employees did you employ on this job?

Mr. Erskine: He has answered you, Mr. Patterson.
Mr. Patterson: All right, then. I will let that stand.
The Witness: If you mean daily how many men employed all the time from the time the steamer started to the finish, that would be about the approximate answer.

Q. Now, how long a period did this work cover in which you employed the 2,500 to 3,000 men?
A. From July 27th to August 16th. Just a moment. To August 31st; yes, August 31st.

250 Mr. Lake: Just what?
The Witness: July 27th to August 31st.

Q. And that work consisted of both unloading and loading the boat?
A. Unloading and loading, bunkering and clerking.
Q. What was that?
A. Clerking, tallying, coopering and watching.
Q. Mr. Rose, you have charged for wharfage against this boat a daily charge of $400.
A. That is true.
Q. That is based on a cash disbursement made by you for the wharf?
A. Yes, sir.
Q. Now, tell us exactly who owned the pier?
A. The pier was owned by a man named Joseph B. Harris.
Q. And tell us exactly just how many or rather how much you paid Joseph B. Harris?
A. The exact amount?
Q. Yes.
A. $400 per day.
Q. And you are quite positive of that?
A. Without any discounts, yes.

Q. Now, it seems that you have been billing the defendant here for thirteen days pier rent before the boat reached the wharf; how do you justify that charge?

A. The pier was arranged for before the steamship "Cunene" arrived at the pier and this part of wharfage that is charged for against the steamship "Cunene," while it only figures $250 a day on this bill, an additional sum of $150 was charged against another steamer that had part of her cargo, that had her cargo on the pier at that time, between July 14th and July 26th, and it was arranged that a charge of $150 a day be charged against that steamer "Sao Antao," from July 14th to July 26th, and the other time of $250 a
251 day, for thirteen days, to be charged to the steamship "Cunene."

Q. But why do you bill the steamship "Cunene" at all for thirteen days prior to the arrival of her at her berth?

A. As arranged for with the agents. They asked that the charge against the "Sao Antao" be made on the basis of $150 a day, and the other thirteen days to be charged at the rate of $250 against the "Cunene." To me it did not make any difference how it was to be charged, how it was made up.

Q. Am I to understand the "Sao Antao," another boat belonging to the respondents, was in berth all those thirteen days?

A. I believe she was in berth, yes.

Q. Are you sure of that?

A. I am not sure, but I believe she was in berth at that time.

Q. But you are not prepared at this time to state positively?

A. No, I am not; she was in berth or her cargo was in berth.

Mr. Erskine: Your best recollection is that she was in berth?

The Witness: To my recollection, I believe she was in berth.

Mr. Erskine: What pier was this?

The Witness: Pier B, Jersey City, on the south side of Pier B.

Q. According to this bill here, she was discharging, the "Cunene" was discharged at the pier July 27th to August 4th, 1920; is that right?

A. To August 16th. Discharging, you say?

Q. Yes.

A. I say the wharfage berth and dock space, bulkheads and farm, south side of Pier B, Jersey City.

252 Q. That is all right. How long was she actually engaged in being discharged?

A. How long was she actually engaged in being discharged?

Q. Yes.

A. From July 27th to August 4th.

Q. Now, then, you say—do you make a charge for loading in stream?

A. Yes, sir.

Q. What are those dates that are covered?

A. August 30th and 31st.

Q. How long did the "Cunene" stay on this pier after July 27th?

A. After July 27th?

Q. No; I mean how long—well, when did she arrive at the pier; that is, the "Cunene"?
A. Must have been July 27th.
Q. When did she leave the pier?
A. From my records or bills, it was August 16th.
Q. And in midstream at that time?
A. She went to anchorage off the Statue of Liberty.
Q. Is it not a fact that on August 16th the "Mormugao" came to that pier?
A. She went to the north side of that pier.
Q. You make two charges for the same pier?
A. No, that pier is subdivided. In other words, two separate piers, so to speak. While it is known as one pier, Pier B, there is the north side and the south side.
Q. Do you make a separate charge for each side of the pier?
A. Yes, sir.
Q. And do you mean to say that you paid $800 a day for the north side and the south side of that pier to Mr. Harris?
A. Absolutely so.
Q. Where is Harris's place of business?
A. At the foot of York Street, Jersey City.
Q. Is he in the dock business?
A. He was, and I believe he is at the present time.
Q. Would you consider $400 a day for each side of that
253 pier the going rate paid in Jersey City for that pier?
A. At that time I consider it a very reasonable rate; in fact, I know it.
Q. Did you ever pay that same rate for other clients?
A. I believe I paid $450 a day for the same pier.
Q. For one side of it only?
A. For one side of it, for the Lind Navigation Company, and I believe it was $450 a day.
Q. At that time?
A. Yes, at that time.

Mr. Lake: Which side?
The Witness: One side, and I believe it was on the south side of the pier; and there are oftentimes that I have engaged that pier for Funch Edye & Company, who engaged the pier through me, and they have been known to pay $400 and $450 per day per side.

Q. You have in part charged for discharging 18,954 bales of corkwood and corkwaste at 25 cents a bale?
A. That is right.
Q. Did you consider that a fair and going charge?
A. A very fair charge.
Q. Did you ever charge it to any other client?
A. I discharged one vessel for the Funch Edye & Company, a Spanish vessel, I believe, and I made a charge to them, my charge to them was 30 cents per bale.
Q. Under the same conditions and at the same time?
A. Under the same conditions and about the same time.

Q. Is that the only firm you have ever discharged corkwood and corkwaste for, or a similar article?

A. That is the only firm I ever had occasion to charge corkwaste for at that time.

254 Q. Do you know of other stevedores that make a similar charge?

A. I don't know the price or prices of other stevedores.

Q. I thought in your direct examination you said you were familiar with the charges of similar work, going charges.

A. By that I mean, as I have said, some stevedores' prices may be higher or lower, but that is a fair charge.

Q. Then am I to understand you on cross to say that you have not familiarized yourself with the charges made by other stevedores in this kind of work?

A. There is no way of ascertaining a stevedore's prices, but we do know, I do know that that price would be in the neighborhood of a going charge at that time.

Q. Well, how do you know it if you are not familiar with the rate charged by people in the same line of business?

A. I don't say, I did not say I was not familiar with the rate. I said I did not know the price or prices of other stevedores, but that I do know that the price of 25 cents a bale would be in accordance with the going prices at that time.

Q. If you don't know what they are charging how can you be familiar with them?

A. It is nothing unusual for one stevedore to ask another what his price would be on a certain date. I do know at that time that some of them were getting more than 30 cents a bale. My charge was 25 cents and I should say others were getting 25 cents a bale, but none that I spoke to at that time were getting less than 25 cents.

Q. Who were some that you spoke to?

A. I spoke to Brady, Brady & Joie.

Q. Who else?

255 A. And I spoke to another man by the name of Pellegrini, of Pellegrini & Son; that is about all I can remember at this time.

Q. And you base your testimony as to custom upon your conversation with these two firms?

A. Beg pardon?

Q. (Question read.)

A. Yes, sir.

Q. If other firms charged between 15 cents and 20 cents for this same work, would you consider that unreasonably low, an unreasonably low charge?

A. At that time, unreasonably low, yes.

Q. Now, you charge for discharging 4,027 cases of sardines at 1[illegible] cents a case. Do you consider that a fair and going charge?

A. A going charge at that time, and a very fair charge.

Q. You know that other firms charged less at times than that do you not?

A. I could not say that I know it to be a fact.

Q. If they do, or if they did, you would consider it an unreasonably low price; that is, for less than 10 cents?
A. Mr. Patterson, I must answer you frankly. If the Commissioner will permit me to make myself very plain, I——
Q. No, just answer the question.
A. Well, I would like to make myself plain before I answer.

The Commissioner: Yes, just answer the question and then you may explain afterwards.

Q. (Question read.)
A. Yes.
Q. Now, you have also charged for discharging 48 cases of furniture at 25 cents a case. Are you prepared to say that that was a fair and customary charge for that kind of labor at that time?
A. Yes, sir.
Q. And if other stevedores charged less than that, would you say that they were charging an unreasonably low price?

Mr. Erskine: If the Commissioner please, I take exception to that form of question. I don't know what Mr. Patterson means by "unreasonably low." I suppose that a man may starve himself, if he wants to. The question is whether our charges are unreasonably high. What I mean to say is, that the answer does not bring out anything.
Mr. Patterson: Oh, this is cross-examination.
The Commissioner: Yes, I will let him go on that line, as long as you do not pursue it too far.

Q. You have charged here in your bill for wench driving time. Will you describe what you mean by wench driving time?
A. It is time for which the steamer pays for men manipulating the steam wenches.
Q. What are those steam wenches used for?
A. For the purpose of hoisting cargo out of the hold or into the hold *or into the hold,* whichever it is.
Q. With reference to discharging, you have already charged at the specific rate so much a bale and so much a case; that is, these prices of 25 cents and 10 cents, and is not the wench which is employed as part of the discharging covered in that bill; in other words, is not that a duplicate charge?
A. No, sir, it is not.
Q. And why do you say that?
A. Because it has always been the custom or standard rule, I might say, in the Port of New York, that wench driving price is extra.
Q. What firms charge extra for it?
A. I dare say all stevedoring concerns in the Port of New York. There are very few exceptions, to my knowledge, if there are any.
Q. If other stevedores do not make such a charge then you would say your statement, would you not?
A. I would not. I would consider it very foolish, because since

I have been in this business I have never known at any time when wench driving time was not charged for, unless it was included in the price which would take care of that charge.

Q. You have charged 466 hours against this particular boat for wench driving time at 97 cents per hour.

A. Yes, sir, exactly.

Q. In order to discharge the boat, however, you have to have wench driving, don't you?

A. Exactly.

Q. Now, you say the reason you make this charge is simply because it is customary in the Port of New York?

A. Yes, sir, we have to have wenchmen to drive the wenches, and naturally we have to charge for them.

Q. Well, that is all included in the complete discharging of the cargo, is it not?

A. No, sir.

Mr. Erskine: If the Commissioner please, that is objected to.

The Commissioner: He may answer.

Q. You cannot discharge the cargo unless you use a wench, can you?

258 Mr. Erskine: I object to all this line of evidence, because there is no contention here that he made a blanket charge.

The Commissioner: I think it is proper cross examination to see whether there has been any duplicate charges. Counsel, apparently, is pursuing it with that end in view.

Mr. Patterson: Yes.

Q. Now, I also notice that you have made a charge for tiering the cargo on the dock and you have got a total charge here against that item of 1,664 hours at 97 cents per hour. In order to discharge a boat it is necessary to tier the cargo on the dock just the same as it is to wench drive, is it not?

A. The Translantic Conference for the Port of New York——

Q. No, just answer the question.

The Commissioner: Just answer the question first, and then you may explain afterwards.

A. Yes, sir, it is necessary .

The Commissioner: Now you can make any explanation you want to.

The Witness: The Transatlantic Conference at the Port of New York sets a standard for tiering cargo the height of a man; in other words, we call it a man's height, and where we have a cargo of 18,95[illegible] bales of corkwaste and 4,027 cases of sardines and 48 cases of fur-

niture, if that cargo were not tiered higher than a man's

259 height, it would be necessary to have three tiers to accommodate that inward cargo, so that the only way that the agents and owners can get away from that expense of obtaining other piers at a much greater cost to them, is to have a stevedore to tier the

cargo, and by doing that it saves the steamer time and money. This particular cargo on the "Cunene" was piled away up to the roof and it was carried about 50 or 60 feet outside of the end of the pier to the street. It was also taken across to the other side of the pier on the lower end and it was carried out to the lower end bulkhead, which was jammed away up high (witness indicating); and in order for us to take care of this cargo it was necessary to make these charges.

Q. The charge in question is for tiering the cargo on dock and trucking cargo to bulkhead and farm and breaking down cargo for delivery and the amount charged for that in this bill is $1,614.08, although you have separately charged under an item entitled "To discharging inward cargo," over $5,000.

A. That is true.

Q. Now, are you prepared to swear positively that it was necessary to employ sixteen men for 1,664 hours to do this work, this particular discharging?

A. Yes, sir.

Q. Did you give this particular item your personal supervision?

A. I did.

Q. Were you at the pier all the time it was being discharged?

A. From the time the steamer started until she finished.

Q. Were you there every day?

A. Yes, sir.

Q. All day long?

A. All day long.

Q. Were you at every part of the pier?

A. Yes, sir, every part of the pier and on the ship.

Q. From July 27th to August 9th, 1920?

A. My time was spent on that pier.

Q. No, from these dates I am asking you, from July 27th, every day——

A. It would not be fair to make an answer to that question, because I gave my time to two different steamers on the pier.

Q. What steamers?

A. The 'Murmugao" and the "Cunene."

Q. Well, between those two steamers you did give your time exclusively and all the time on these dates?

A. On these dates, exactly.

Q. Now, if some other stevedore is prepared to state that he could have done this particular work in one-half the time, would not that influence your judgment as to the reasonableness of your charge?

A. That is not quite clear to me, Mr. Patterson.

The Commissioner: Oh, I don't think it is a proper question. I think it is purely argumentative.

Mr. Patterson: But, if the Commissioner please, he says those are the customary charges.

The Commissioner: Whether his testimony would be influenced by what another man testified to is another question. Well, since there is no objection to your question, you may go ahead with it.

Q. Now, what is this item here that you have got down,
261 bunkering coal and trimming the same in bunkers. You have got 1,670 tons of coal at $1.10 per ton, for apparently bunkering and trimming.

A. That item for bunkering coal and trimming same in bunkers covers the price for loading the coal into bunkers and trimming it.

Q. Do you consider $1.10 per ton for doing this work a reasonable, going charge for that work?

A. Yes, a very reasonable, going charge at that time.

Q. Now, I notice that you have got another item in here to extra men employed in trimming the coal in coal gang, in excess of twenty-four men, and this trimming ran from August 4th to August 10th, inclusive, and amounts to 340 hours at $1.02 per hour. What is the necessity or was the necessity for having extra men bunkering and trimming the coal?

A. The arrangement is made with the steamship owners and agents that employs the stevedores, as far as the coal gang is concerned. At the Transatlantic Conference in 1919, October 1st, they decided that a coal gang shall comprise twenty-four men and one foreman, and all men required in excess of that number to be charged for as extra labor and to be paid for by the steamship. In other words, if we have a steamer where it requires thirty-four men to do the work and our tonnage price is based on twenty-four men to a gang, the other ten men that we employ in excess of the twenty-four, must be paid for by the steamship owners, and that was a rule laid down October 1, 1919, between the steamship owners and agents and the Transatlantic Conference.

Q. Have you ever made similar charges to similar clients for work of that character?

A. On some.

Q. All right. Now, please explain the item, "Detention
262 paid men while waiting during rain, and finally sending gang home."

A. The Transatlantic Conference, which manages the affairs of steamship owners and agents with stevedores and with the International Longshoremen's Association, made a rule October 1, 1919, in which they said that when gangs are ordered out and ready to go to work and if they are held up on account of rain or snow, or any other condition which may arise which prevents men from going to work, and they lose their time, they must be allowed two hours, and in this case it rained and we got the men there waiting, hoping it would stop raining, and have got to go on towards the time where we did not think it was going to stop raining we finally decided to send them home and give them their two hours.

The Commissioner: You mean to say that you charged for them even though they did not do a lick of work?

The Witness: Yes, sir, and which is a rule made by the Transatlantic Steamship Conference.

Q. These rules of the Transatlantic Conference are conformed to by all stevedores?

A. Yes, sir, with the exception of a small percentage.

The Commissioner: Does that comprise all union men?
The Witness: Yes, sir.
The Commissioner: And about ten per cent of non-union labor?
The Witness: As far as labor is concerned, I guess it covers 100 per cent. He was asking me about stevedores.

263 Q. Now, you have an overtime item in here for clerk, dock clerk, and checkers, 96 hours, at $1.35; coopers, 48 hours at $1.35; making in all an item of about $200. Now, this boat was in the pier for twenty-one days, according to your bill. What is the necessity for overtime of your clerks and checkers and coopers?

A. It is always necessary in order to expedite—I don't see that right here, Mr. Patterson.

Q. It is on page 2 of your bill, "Overtime."

A. Over $200?

Q. Well, about that.

A. For a man that is employed by a steamship company to give his level best to the people that employ him, he always tries to do things that will benefit those who employ him; and by that I mean this: Oftentimes it is necessary for us to have our clerks and checkers and coopers come down there on Sunday or early in the morning, say, between seven and eight, and which is considered overtime, and between five and six, which is considered overtime, to get things lined up so that we can, if possible, well, so that we will try if possible and dispose of the cargo in the least possible time; and that is the reason for the overtime. Oftentimes we might have trucks on the pier after five o'clock and it is necessary to get the cargo away that night.

Q. I ask you in this particular case where the boat was in berth twenty-one days, why it was necessary to have overtime on Sundays and other times, as you have testified?

A. For that purpose. If it were not for the fact that we keep these men there as I have explained, it is likely that the cargo of that steamer would have been on the pier a couple of days

264 more, and in working these men a little overtime by delivering freight we naturally save some time for the ship; and so this expense of $194, or whatever it is, whatever it may be, saved the steamer two or three days' wharfage, and so I took it upon myself to get rid of some of this freight during the overtime, at the overtime rate, of course.

Q. Now, you have charged an item here to telephone, stationery, etc., $22?

A. Yes, sir.

Q. Where would you use any substantial amount of stationery?

A. To begin with we have to buy delivery pads, delivery books, delivery cargo books.

Q. For each particular boat?

A. Yes, sir, and each particular boat has a cargo book of its own. After the cargo is completed it is returned to the agent, the same as a ledger, which gives you a record of your cargo, showing what each consignee has received, to whom it was delivered, etc. Before the clerk gets that in his hands a checker is employed on the pier

to tally each package or item or lighter, whatever it may be, and when he tallies that with the lighter or truck, he brings that tally slip into the office and then that clerk makes an entry in his ledger for which he takes the signature from the receiver, and in that way we enter the separate book, we enter in a separate book for each steamer showing how the cargo was disposed of.

Q. How much of this $22 item represents telephoning?

A. I guess the greater portion of it.

Q. Don't you consider telephone charges as going into the overhead of your business, generally speaking?

A. How can it?

Q. You must use a telephone for your business or in your business, don't you?

265 A. There is a public pay station on that pier, and that is the reason we use telephone calls, so that the clerk will get in touch with the consignee and tell him that he must remove his cargo from the pier within a reasonable time, and he keeps on shaking him up all the time. That is the reason for the telephone cost.

Q. Does this telephone charge comprising the greater part of the $22, represent calls that were put through from your office and not for calls from your office to the pier?

A. This $22 was not paid from the pier to my office; it was paid for by the clerk calling up the different consignees who owned the cargo on that pier.

Q. Where the call would come in from the pier pay station?

A. Yes, sir.

Q. And it represents an actual disbursement?

A. Yes, sir, it represents an actual disbursement.

Q. With reference to loading the boat for the outward voyage, would the testimony you have given with reference to items on the inward voyage cover similar items on the outward voyage?

A. Well, I don't know if there are any similar items other than wench driving time, or probably overtime or something like that.

Q. You were pretty well acquainted with the firm of Roderick & Rumsey, outside of your business relations, were you not?

A. Not pretty well. Mr. Roderick, I have known him for six or seven years, and Mr. Rumsey, I only have had the pleasure of knowing him up to now, about two years and a half.

Q. Did you ever have any business relations with Mr. Roderick?

A. In what way?

Q. Outside of rendering services to the Portuguese Government boats?

266 A. Yes, sir, we organized a company at one time called the Lloyd Portuguese Navigation Company; Mr. Roderick, Mr. Rumsey, Mr. R. S. Bonny and myself.

Q. What percentage of the stock did you own?

A. Half, twenty-five per cent.

Q. And Mr. Roderick?

A. Each had an equal share, all four.

Q. Each twenty-five per cent?

A. Yes, sir.

Q. How long did that company run?

Mr. Erskine: I have no objection to going into matters concerning this other company, but it seems to me we are wasting time.

The Commissioner: Do you make this as preliminary for collusion or something of that kind?

Mr. Patterson: Yes.

Q. Now I repeat, how long did that company run?

A. It ran about, well, it never started; we went into one proposition and lost the money, and that was the end of it.

Q. Then the company discontinued functioning?

A. Yes, sir.

Q. What other business details did you have with Roderick or Rumsey?

A. None of any kind.

Q. They gave you exclusive stevedoring, exclusive stevedoring work, did they not for the Transportes Maritimos do Estado?

A. Yes, sir.

Q. They never submitted bids to other firms, did they?

A. I believe that they received tenders from others, but——

Q. Well, it is a fact, is it not, that they never let the business to any other persons but to your concern?

A. Yes, sir.

267 Q. And it is a fact that other firms submitted bids and tried to get the business?

A. I don't know it to be a fact.

Q. Well, you have heard of that?

A. I have heard of other firms trying to get the business, but I had the business all the time and I guess they didn't care about making any change.

Q. You never did submit bids for any of the business?

A. Oh, yes, before I got the business I had to submit my prices.

Q. After you started doing business as a stevedore for the Transportes Maritimos do Estado boats under the jurisdiction of Roderick & Rumsey, you never had to submit bids, did you? I am asking you about afterwards?

A. No, not after I did the business.

Q. Did you ever pay any money as a result of getting this business, directly or indirectly, to either Roderick or Rumsey?

A. Never.

Q. Did you ever divide any of the proceeds of the stevedoring of this concern with Roderick or Rumsey?

A. No, sir; I think they are beyond that.

Q. Did you ever directly or indirectly pay them any sum of money in connection with this business?

A. Not in connection with the business, no, sir.

Q. Did you ever pay them any money, directly or indirectly, in connection with any other business?

A. Only in reference to that one corporation that we formed, the Lloyd Portuguese Navigation Company.

Q. Did you ever give Mr. Roderick or Mr. Rumsey or both of them a gratuity of any kind?

A. Never.

Q. Was your arrangement with Roderick & Rumsey in
268 writing?

A. No, we never had any arrangement about stevedoring in writing; in fact, I have no arrangement with any other firms in writing.

Q. Did you ever have any arrangement of any kind with Roderick & Rumsey in connection with the Transportes Maritimos do Estado in writing?

A. Not to my knowledge, no, sir.

Q. Now, Roderick & Rumsey called to your attention that, on this "Cunene" ship, some of the cargo discharged was broken and lost; that is a fact, is it not?

A. Some of the cargo was broken and lost?

Q. Yes.

A. That is nothing unusual to call attention to the stevedore or the clerk in charge that some of the cargo turned out short, or something of that kind.

Q. Did they make in connection with this very boat, the "Cunene," that part of the cargo that you handled was broken and also lost?

A. No, sir.

Q. You never made an allowance for it?

A. No, sir, and nothing was ever called to my attention concerning anything of that kind.

Q. You are sure of that?

A. I am quite positive.

Q. Was not this cork for which you charged in discharging damaged as a result of the method of discharging the cargo?

A. On a cargo of cork-waste there is always a certain number of bales that will be broken open on account of handling.

Q. There was a substantial amount of damage to this particular cargo?

A. Yes, and of course on a cargo like that a good deal, a goodly portion of the bales come out in bad condition.

Q. And that was called to your attention?

A. Called to my attention——

269 Q. I mean you were there personally supervising the job?

A. Yes, sir, but I cannot say it was called to my attention particularly.

Q. But you saw it yourself?

A. Absolutely, yes.

Q. Did you make an allowance for any such condition as that?

A. How do you mean an allowance?

Q. For the condition of the cargo in which it was discharged.

A. On account of the way we handled it?

Q. Yes.

A. No.

Q. Did the captain of this boat, the "Cunene," make any payment of any kind to you on account?

A. No, sir.

Q. Now, the concern that did this work, according to your libel, is the Battery Operating Company?

A. Exactly; that is, on the clerking, coopering, watching, and tallying.

Q. Well, on everything, according to your libel?

A. Not on stevedoring.

Q. Well, you state in the record, that is, the bills offered by you in evidence, show the different services rendered by the two different companies.

A. They speak for themselves.

Q. Mr. Rose, you know as a fact, don't you, that the freight collected for the Transportes Maritimos do Estado by the "Cunene" in New York would not defray the charge or charges you have put in here for loading the boat?

A. No, I do not know it to be a fact.

Q. Have you heard that?

A. I have not.

Q. Are you familiar with charges on freight from Lisbon to New York or New York to Lisbon?

A. I have not the slightest idea; that is not part of my business to know.

270 Mr. Patterson: That is all the examination for the present.

By Mr. Erskine:

Q. You were asked some questions about making an allowance for breakage. You testified that there was some breakage which you saw. Will you state whether or not that breakage was due to negligence on the part of your employees?

A. No, it was not.

Q. State, if you can, the cause or causes of the breakage, as far as you know?

A. Well, the cause for breakage on bales of corkwaste and corkwaste is due to the fact that it is a package that is just tied around with wire straps, and usually when taking them out of the hold of the ship, by moving them around, why those straps usually come undone, and naturally they fall apart.

Q. And even in spite of the exercise of ordinary due care?

A. I can say that we took more than necessary and ordinary care in the handling of that cargo, in a good, clean way, or it would not have been damaged to any great extent.

Q. Has it ever been customary in your experience in connection with steamers or with owners and agents to make allowances on stevedores' bills?

A. Never. If such would be the case the rates for handling commodities of that kind would be awful; it would have to be handled more carefully than glass.

Q. With respect to the item of telephone charges, is it customary for stevedores to incur and include those charges?

A. Not for the stevedore, but for the clerk. It is necessary
271 this way: The clerk must always be on the job to have the cargo taken away in the least possible time so as to save the steamer wharfage, and by using the telephone to get in touch with the consignees to try and make them expedite delivery, why, these telephone calls are necessary so as to save the steamer wharfage.

Q. And is that customarily done in this kind of work?

A. Yes, sir, it is.

Q. Those charges are customarily incurred?

A. Yes, sir.

Q. And are included in the final account between the stevedores and the agents of the ship?

A. Yes, sir. I would not say the stevedore, but the man who is in charge of the clerk.

Q. And that was in this case who?

A. The Battery Operating Company.

Q. Now, you were asked a number of questions about charging overtime, for extra men, etc. Am I correct in understanding that the terms on which you undertook to do the work covered only normal conditions, so that extra and overtime would be an extra charge?

A. Exactly, and any overtime of any kind or extra labor of any kind was always as per instructions by the captain of the steamer and the agents.

Q. Therefore, you did not at any time make any agreement to do any work for a figure which would include overtime and extra?

A. No, I never did.

Q. Now, you referred a number of times to the rulings of the Transatlantic Conference. Am I correct in understanding that that conference merely established a course of business which was acceptable to all parties, and at the time of these services they were well known in the Port of New York?

272 Mr. Patterson: If the Commissioner please, I would like to ask if that conference is in writing, those written rules?

The Witness: Yes, sir.

Mr. Patterson: Well, then, I object to his testifying any further, unless he produces the written rules.

Q. Are you familiar with the terms of the Transatlantic Conference?

A. I am as far as my charges are concerned.

Q. Your charges and rates are based on the rulings of that conference, are they not?

A. Exactly.

Q. As I understand it then, the basis of rendering the bills was fixed by the conference and are well known to all stevedores?

Mr. Patterson: One moment. I object, if the Commissioner please, to all of this. This witness can testify to anything. Let him produce the rules that are in writing.

The Commissioner: As I understand the testimony of this witness, he is detailing the practice and custom which arose after the Transatlantic Conference and he is not giving the contents of the agreement that was there reached. Of course, if the contents of that agreement become material or is material and relevant, why that would be different. I overrule the objection.

Mr. Patterson: And I take an exception. If the Commissioner please, my further objection is that the question is incompetent and should not be allowed without the production of the rules
273 and regulations of the Transatlantic Conference, which is admitted to be in writing.

The Commissioner: Overruled.

Mr. Patterson: And I take an exception.

Q. (Question read.)

A. Yes.

Q. And the custom which you have testified to, of which you have knowledge, arises out of the rulings made at that conference?

A. Yes, sir.

Mr. Patterson: I make the same objection.

The Commissioner: Overruled and I give you an exception.

Mr. Erskine: We will have that understood, Mr. Patterson.

The Commissioner: From the first objection and exception taken by Mr. Patterson, let the record show that it is to be understood that all the testimony along the same line will be received over the same objection and Mr. Patterson is to be allowed a similar exception in each instance without repetition.

Mr. Patterson: Yes.

Q. Now, Mr. Rose, did you in any one of the items of the bills which are in evidence duplicate any charges, that is, make the same charge twice?

A. No, sir.

Q. You were asked why you were charging for wenchmen in addition to charging for discharging. Did your charge for discharging involve a rate which included the services of wenchmen?

A. No, sir.

274 Q. As a matter of fact, does it not happen to be a fact that wenchmen should be furnished by the ship itself?

A. Yes, sir.

Q. Well, in this case would that have affected the rate you charged for discharging?

A. No, sir.

Q. Mr. Patterson asked you several questions about engaging the pier for thirteen days before the vessel "Cunene" came alongside. I don't think the record is quite clear on that point. I think that what Mr. Patterson was trying to get at was why it was necessary to engage the pier for thirteen days before the vessel got there.

A. Well, in those times piers were at a premium, and when the agent or agents received word from the owners on the other side that a steamer would be here at a certain time, he would call me up and ask me to engage the pier for a certain date.

Mr. Patterson: Is not this the particular case of the "Cunene"?
The Witness: No, not in the case of the "Cunene."
Mr. Patterson: Well, that is what you are testifying concerning now?
The Witness: Mr. Erskine didn't ask me that.
Mr. Erskine: We are testifying now in the case of the "Cunene."
Mr. Patterson: Just read the question.

(Question read by the stenographer.)

Mr. Patterson: I move to strike out the other answer then.
The Witness: The pier at that time was already taken up by another steamer called the steamship "Sao Antao," owned by the same owners as the steamship "Cunene."

275 Mr. Lake: Which side was the other boat on?
The Witness: On the south side, the same as the "Cunene," and as soon as the "Cunene" came to the pier we put her on that berth, and when the accounts were made up the agent asked me to arrange my accounts so that thirteen days would be charged against the "Cunene" at $250 a day and the other thirteen days at $150 per day against the steamship "Sao Antao."

Q. What was the reason for that?
A. The real reason I don't know other than what the agents wanted to arrange the account in that way, so that they asked me to split the accounts.
Q. Was there a cargo from an earlier steamer?
A. Yes, the cargo of the other steamer; the steamer was at the pier and we were receiving cargo for her at the pier.
Q. It is unusual where there are two steamers of the same owner to apportion the charges between the two steamers?
A. No, sir.
Q. Were the captains of the two ships consulted about this proportionate charge?
A. Yes, sir.
Q. Both of them?
A. Both of them.
Q. Did they raise any objection to it?
A. None whatsoever.
Q. And you say that it was nothing unusual in that procedure?
A. Nothing at all.
Q. Was it customary at the time these services were rendered for stevedores to undertake to discharge or load a vessel for a lump sum or figure, or was it customary to charge for each separate

276 item of the work?
A. Separate charge for each item.
Q. And that is what you have done here?
A. Yes, sir.
Q. As I remember it, you were asked some question about charges for loading in the stream, and then you started to make some explanation which was cut off. Is there any explanation that you want to make about those charges now?
A. In what way?

Q. I don't know what it was you started to say, but there was some question, you were asked to answer some question yes or no and you said you could not do it without an explanation.
A. Oh, about rates. I know for a positive fact that oftentimes my price or prices——

Mr. Patterson: Oh, no, that is not it.

Q. Well, is there anything you had in your mind that you wanted to testify about that you have not covered?
A. Only about the wench driving time.

Mr. Erskine: If the Commissioner please, without prejudice to my objections to the certificate which has been offered in evidence by Mr. Patterson, I will ask the witness this question:

Q. State who were the parties comprising the Battery Operating Company at the time the services were rendered?
A. My wife and myself.
Q. Do you remember whether or not at the time you gave me the information to draw this libel you advised me of any interest of your wife in the company?
A. I guess I forgot that.
Q. How did you come to forget it?

Mr. Patterson: Oh, I object to this as immaterial and irrelevant.
The Commissioner: Objection sustained, but I will permit the witness to answer and give the answer nevertheless. I want it physically incorporated in the record so that the court will see it.
The Witness: Being my wife, I did not think it was necessary, that is all. We were partners in everything else in life, and I did not think it was necessary to mention the fact; in fact, I never gave it a thought.

Q. Have you during all the time that your wife has been associated with you conducted the business yourself?
A. Yes, sir.

Mr. Patterson: I object to the question and I move to strike out the answer of the witness thereto on the same grounds that I have heretofore made as the basis of my objection.
The Commissioner: The motion is granted.

By the Commissioner:

Q. What portion of interest does your wife hold in the business?
A. Half interest.
Q. And you say you have actually conducted the business yourself?
A. Yes, sir, absolutely.
Q. Done all the work?
A. Yes, sir.

Q. What does your wife do in connection with the busi-
278 ness?

A. Well, she used to keep some accounts, and all that sort of thing, nothing to speak of; help me with my typewriting; that is ab-ut all she ever done.

Q. In other words, you and your wife were equal partners in this *in this* business of the Battery Operating Company?

A. Yes, sir, exactly.

The Commissioner: I guess we will adjourn now.

(Whereupon the hearing was adjourned to Wednesday, September 28, 1921, at 2 o'clock P. M.)

New York, No. 2 Rector Street,
September 28, 1921.

Appearances: Same as before.

(Adjourned to Monday, October 3, 1921, at 2 P. M.)

New York, No. 2 Rector Street,
October 3, 1921.

Appearances: Same as before.
Met pursuant to adjournment.

Mr. Patterson: I understand that the libelant's case is rested.

Mr. Erskine: Yes.

279 Mr. Patterson: I now move to dismiss the claim of libelant, first, on the ground that there is apparent misjoinder or non-joinder of the real parties in interest in this claim, and that it will be impossible, therefore, as the pleadings and proof now stand, for the Commissioner to ascertain the amount due the libelant, or any amount; second, on the ground that the libelant has not proved properly and sufficiently any damages on which the Commissioner can make an award of any amount due; third, on the ground that a proper basis has not been made for the proof offered by the libelant in attempting to sustain his claim.

I also move to terminate this reference and dismiss it on the ground that it appears that the pleadings and present status of the case is not in shape for the Commissioner to pass upon the questions referred to him.

Mr. Erskine: If the Commissioner please, I object to the motion. Without waiving any other objections open to me as to this action, I object first on the ground that it cannot be entertained unless the claimant and respondent states or is held by the Commissioner to have also rested.

The Commissioner: I reserve decision on the motions to dismiss until both sides have rested.

Mr. Patterson: I take an exception to your Honor's ruling.

Let the record show that proctor for the respondent now
280 rests and renews each and every motion made at the close of the libelant's case and upon the same grounds stated therein.

Mr. Erskine: If the Commissioner please, I object to this motion, reserving my objections to the Commissioner's ruling on the motions as made at the close of the libelant's case.

I also object to the motion generally that the grounds are not well taken, and specifically as to the question of nonjoinder. I object to the question raised by the respondent as not now before the Commissioner and that is not the proper place and time at which to raise any such question.

I submit further that there is no proof of any non-joinder or misjoinder, as such, and if there has been non-joinder, which I do not admit, I shall apply for leave of the Court to correct the non-joinder nunc pro tunc, without prejudice to any and all proceedings heretofore had herein.

I call the Commissioner's attention to the fact that the respondent and claimant in its answers admit that the libelant has rendered services for which the libelant has not been paid.

Hearings closed.

281 *Commissioner's Report.*

United States District Court, Southern District of New York.

In Admiralty.

No. 75-220.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Ben A. Matthews, appointed Commissioner herein, by interlocutory decree and order of reference made and entered in the above entitled proceedings, do hereby report as follows:

That I was on September 23, 26, 28 and October 3, 1921, attended by the proctors for libelant and respondent and the libelant in person. The libelant, Maxwell Rose, was the only witness examined or called.

I find that libelant has been engaged in the stevedoring business for twenty (20) years and has been in such business for himself since 1913. In July, 1920, he was employed by Roderick & Rumsey, then the agents for the respondent, to render services in secur-

ing a berth for the steamship "Cunene" and for discharging,
282 loading and coaling her, as well as for arranging for and providing checkers, clerks, coopers and watchmen and making the necessary arrangements incident thereto. When the work was completed bills were presented to the captain of the "Cunene," who approved same by signing them. Immediately thereafter these bills were presented to Roderick & Rumsey, the agents. These bills were received in evidence as Exhibits 1, 1A, 1B, 1C and 1D, and are hereto annexed as a part of this report.

Libelant personally supervised the performance of the work and the furnishing of the services, etc., covered by the bills. He testified, and I find, that the bills correctly state the items for services to the ship and that the amounts charged are based on the usual and customary, or "going" charges for like services at the Port of New York. I also find that all the items for services contained in the bills represent services necessary to the proper performance of the work for which libelant was employed.

Hearings in this matter and in the case of Maxwell Rose, etc., against the steamship "Murmugao" (Docket No. A—75-219, similarly referred to me) were held on the same days. At the outset it was contemplated that the record in each case should be complete and independent of the other. Identity of parties, proctors and witness, however, has resulted in the failure to accomplish this result. The two records, therefore, must be read to get a complete picture of either case. At the close of the hearings proctors stipulated that this might be done.

Libelant was frank and direct in his answers on cross examination and explained carefully and in some detail each item covered by the bills about which he was interrogated. There was no evi-
283 dence whatever offered by respondent after libelant finally rested its case. In the memorandum filed with me at the close of the proceedings claimant does not attack any of the items. Part of claimant's cross examination was intended to bring out evidence of collusion between libellant and the agents. No collusion whatever was shown. On the evidence, I find that the libelant originally got the stevedoring and similar business of respondent by submitting a bid for the work, and thereafter continued without further submission of bids although other stevedores were seeking to get the business.

A number of references were made in the testimony to the Transatlantic Conference at which an agreement was reached between stevedores and owners and agents of steamships. As it does not appear whether claimant and libelant were parties to any such agreement I have disregarded all reference to same in reaching my conclusion.

Claimant urged before me an alleged fatal non-joinder of parties libelant. The libel reads, "Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company," etc. It appears that on April 14, 1919, Maxwell Rose and Bertha Rose, his wife, filed in the New York County Clerk's office a certificate acknowledged April 8, 1919, as follows:

"We, Maxwell Rose and Bertha Rose, do hereby certify that we conduct or transact business under the name of the Battery Operating Company."

It also appears that at the time the services were rendered in this case both libelant and his wife were partners in the business con-
284 ducted under the name Battery Operating Company. Libelant testified that each owned a half interest and that since he actually conducted all the business himself he forgot to tell his proctor of the partnership relation at the time the libel was drawn.

The question presented is whether upon the assessment of damages it is possible to proceed to final decree on the Battery Operating Company items without having the wife joined as a party libelant. In my opinion, the question of non-joinder was waived by respondent's failure to raise it earlier in the proceedings. Rowley on Modern Law of Partnership, pp. 1099 and 1101 as follows:

"Advantage may be taken by demurrer of the fact that a partnership sues by its firm name, if it appears on the face of the pleading that the suit is so brought; or by motion to dismiss; or by a plea in abatement. The defect may be cured by amendment; or waived by failure to object. And it has been held that objection after judgment is too late. * * * Under the Codes, non-joinder by a partner as plaintiff should be raised by demurrer, if apparent, by answer; else the objection is deemed waived."

At common law a dormant partner is not a proper or necessary party plaintiff in a suit to enforce a partnership contract. Clark v. Miller, 4 Wend. (N. Y.) 628, 10 N. Y. Com. Law Reports, 732; Clarkson v. Carter, 3 Cowen (N. Y.) 84, 8 N. Y. Com. Law Reports, 59.

285 A similar result has been accomplished under the code by holding that a trustee of an express trust may sue without joining the beneficiaries. Weber v. Columbian Amusement Company, 160 App. Div. 835, 837; Meinhardt v. Excelsior Brewing Company, 98 App. Div. 308, 311. See also Weill v. Paradise, 188 N. Y. S. 287, 290; Secor v. Keller, 4 Duer (N. Y.) 416, to the contrary was expressly overruled in the Meinhardt case.

In several of the cases cited, plaintiffs have been allowed to recover in spite of similar non-joinder of a partner. The test is whether payment of a judgment recovered by the plaintiff would fully protect the defendant from the claims of third persons. Payment to libelant or satisfaction of final decree when entered would discharge the obligation of the respondent. There is, therefore, no objection to allowing libelant to recover.

In conclusion, from the testimony adduced before me, I find and report that the libelant, doing business under the trade name Battery Operating Company, at the special instance and request of the agents and captain of the above named vessel, provided wharfage, dock space, bulkhead and farm on the south side of Pier B, Jersey City, New Jersey, from July 14 to August 16, 1920, inclusive, electric light service on said pier, and took away refuse from said pier, as

shown by Exhibit 1, and that the reasonable value thereof is the sum of $11,857.00 and also from July 27 to August 16, 1920, performed services in tallying, watching and coopering inward cargo from said vessel for which as shown by Exhibit 1A the reasonable, fair value is $3,232.20, and also on August 30, and August 31, 1920, performed services in tallying and checking outward cargo for
286 said vessel for which as shown by Exhibit 1B the reasonable fair value is $75.40.

Also I find and report that libelant, doing business under the trade name of Whitehall Stevedoring Company, at the special instance and request of the agents and captain of the above named vessel performed services in discharging inward cargo, winchdriving, tiering cargo on dock, trucking cargo to bulkhead and farm and breaking down cargo for delivery, as shown by Exhibit 1C for which the reasonable fair value is $7,209.35, and performed services in bunkering coal and trimming same in bunkers, as shown by Exhibit 1D for which the reasonable fair value is $2,260.16, making a total due the libelant of $24,634.11, together with interest at the rate of 6% per annum from August 31, 1920.

I annex hereto the testimony and exhibits received before me.

Dated, New York, October 18, 1921.

Respectfully submitted,

BEN A. MATTHEWS,
Commissioner.

287 *Exceptions to Report of Commissioner.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

The respondent herein hereby excepts to the report of Ben. A. Matthews, Esq., Commissioner, under the interlocutory decree herein, filed the 30th day of October, 1921, as follows:

1. Because the said Commissioner found that the libelant rendered services and furnished materials to respondent of the reasonable value of $24,634.11.

2. Because the said Commissioner found that the libelant, doing business under the name of the Battery Operating Company, rendered services and furnished materials of the reasonable value of $15,164.60.

3. Because the said Commissioner found that it was possible to proceed to final decree on the Battery Operating Company items without having libelant's wife joined as a party libelant.

4. Because the said Commissioner found that the libelant,
288 doing business under the name of the Whitehall Stevedoring Company, rendered services and furnished materials of the reasonable value of $9,469.51.

5. Because the said Commissioner received in evidence the bills alleged to have been rendered by libelant, no proper basis having been laid for their reception.

6. Because the said Commissioner refused to grant respondent's motions at the close of the hearings to dismiss the claim and reference on the grounds there stated.

7. Because the said Commissioner committed errors in the taking of testimony and his rulings thereon as evidenced by the objections and exceptions taken by the claimant as more fully appears in the minutes.

Dated, New York, October 25, 1921.

Yours, &c.,

FRANK M. PATTERSON,
Proctor for Respondent.

Office & Post Office Address, 30 Pine Street, Borough of Manhattan, City of New York.

To Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Libelant, and Alexander Gilchrist, Jr., Clerk of the U. S. District Court.

289 *Opinion.*

United States District Court, Southern District of New York.

MAXWELL ROSE

against

TRANSPORTES MARTIMOS DO ESTADO.

LEARNED HAND, *D. J.:*

Two questions only were argued, the non-joinder of Mrs. Rose and the limit of respondent's right to cross-examine. As to the first, every one appears to have forgotten that these are libels in the admiralty and that no other procedure governs. The case is covered by our local Eighteenth Rule which provides: "Whenever, from * * * defect in the pleadings or proceedings, or otherwise, new parties to the suit are necessary, the persons required to be made parties may be made such either by petition on their part or by petition of the adverse party." If the respondent wishes for its protection formally to bind Mrs. Rose, she may be made a party on its petition. The objection is not good by exception to the Commissioner's report. The prosecution of the libel by one partner is at

most only "a defect in pleadings or proceedings," and can at any time be corrected so as to protect the respondent.

The Commissioner might have allowed the respondent
290 further time to cross-examine on the "Transatlantic Conference," but the right was subject to his discretion. There is no reason shown why the respondent could not have had the document present at the second hearing. It was apparently available generally and was certainly not a document over which the libelant alone had control. One adjournment had already been had after the direct examination was closed. Moreover, there is no suggestion anywhere as to what the cross-examination would have disclosed, had it been allowed, and therefore no reason to suppose that the ruling was prejudicial to the respondent's case.

The further objection is made that there is no proof that the respondent was a foreign corporation. This is not the subject of an exception, being settled by the interlocutory decree. That decree may be erroneous, but if so it should be opened by direct application. Moreover, so to open it, the respondent must show that it was not a foreign corporation and that some injustice has therefore been done. Nor do I mean to suggest that the traverse is sufficient pleading to raise the issue. The more common rule is that after appearing under the name in which it is sued the defendant corporation may not raise the issue nul tice corporation, Ferris, etc. Co. v. Thompson, 116 Fed. R. 832, 836. The objection is properly matter of abatement.

The exceptions are overruled and final decree will enter.

November 12, 1921.

L. H., *D. J.*

291 *Final Decree.*

At a Stated Term of the United States District Court held in and for the Southern District of New York at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 16th day of November, 1921.

Present: Honorable Learned Hand, District Judge.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

This cause having duly come on to be heard on the pleadings and exceptions filed by the libelant to the answer of the respondent herein, and having been duly argued by advocates for the respective parties, and due deliberation having been had, and the Court having filed its opinion in writng directing that said exceptions to respondent's answer be sustained, and an order having been entered herein on the

17th day of August, 1921, directing that the exceptions filed by the libelant to the answer of the respondent herein be in all respects sustained, and an interlocutory decree having been entered
292 herein on the 17th day of August, 1921, whereby it was ordered, adjudged and decreed that the libelant herein recover of and from the respondent and its stipulators the damages sustained by the libelant by reason of the matters and things alleged in the libel, with interest and costs, and directing that Ben A. Matthews, Esq., as Commissioner, ascertain and compute the amount of libelant's damages and report thereon to this Court, and the said Commissioner having filed his report on the 21st day of October, 1921, wherein he found the libelant's damages to be the sum of $24,634.11; and exceptions to the Commissioner's report having been filed, and said exceptions having been duly argued, and the Court having filed its opinion in writng overruling the said exceptions and directing that a final decree be entered in favor of the libelant; and the costs of the libelant having been taxed at the sum of $293.15; it is now by the Court

Ordered that the report of the Commissioner herein be and it hereby is confirmed; and it is further

Ordered, adjudged and decreed that the libelant herein, Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, have, receive and recover of and from the respondent, Transportes Maritimos do Estado, and its stipulators the sum of $24,634.11, the amount of libelant's damages, with interest thereon from the 31st day of August, 1920, amounting to the sum of $1,789.17, together with the sum of $293.15, costs of the libelant as taxed, amounting in all to the sum of
293 $26,716.43, with interest thereon until paid; and it is further

Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after service of a copy of this decree and notice of entry upon the respondent or its proctors the stipulators on behalf of the respondent cause the engagement of their stipulations to be performed or show cause within four days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

LEARNED HAND,
U. S. D. J.

Consent for Order of Substitution.

United States District Court, Southern District of New York.

MAXWELL ROSE, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

It is hereby consented, that F. Dudley Kohler of 25 Broadway, Borough of Manhattan, City of New York, be substituted in the place

and stead of Frank M. Patterson, as proctor for the respond-
294 ent in the above entitled action, and that an order to that effect may be entered without further notice.

Dated, New York, November 15th, 1921.

FRANK M. PATTERSON,
Proctor for Respondents.
GEORGE S. DUARTE,
Consul General of Portugal.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of November, 1921, before me personally came the above named George S. Duarte, to me known and known to me to be the person described in and who executed the foregoing consent and he thereupon acknowledged to me that he executed the same, and that he is the Consul General of Portugal.

ROSE ALEXANDER,
Notary Public, New York County.

New York County Clerk's No. 213.
New York Register's No. 3171.
Commission expires March 30th, 1923.

295 *Order of Substitution.*

At a Term of the District Court held in and for the Southern District of New York at the Post Office Building, in the Borough of Manhattan, City of New York, on the 16th day of November, 1921.

Present: Hon. John C. Knox, District Judge.

MAXWELL ROSE, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

Upon reading and filing the annexed consent of Frank M. Patterson and of George S. Duarte, Consul General of Portugal in the State of New York, as the lawful representative of the above named respondents herein, who have their place of business in the Republic of Portugal, and on motion of F. Dudley Kohler, it is hereby

Ordered that F. Dudley Kohler of No. 25 Broadway, Borough of Manhattan, City of New York, be and he hereby is substituted in place of Frank M. Patterson as proctor for the respondents in the above entitled action.

JNO. C. KNOX,
U. S. D. J.

296 *Notice of Appeal.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

SIRS:

Please take notice, that the Transportes Maritimos do Estado, claimant in the above entitled action, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from a final decree of this Court, filed and entered on the 16th day of November, 1921, and from each and every part thereof, and also from the interlocutory decree sustaining exceptions, filed and entered in said clerk's office on the 17th day of August, 1921, and from each and every part of said interlocutory decree.

Dated, New York, November 25th, 1921.

Yours, etc.,

F. DUDLEY KOHLER,
Proctor for Claimant.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

297 To Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court, Southern District of New York; Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs., Proctors for Libelant, 27 William Street, New York City.

Assignments of Error.

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

The respondent Transportes Maritimos do Estado, appellant herein assigns errors to the findings, decision and decrees, of the District Court herein, in the above entitled action as follows:

1. In that it held that the answer of respondent herein did not state facts sufficient to institute a defense to the allegations in
298 the complaint herein.

2. In that it held that by appearing in this action and answering the libel, this respondent had waived its claim to immunity to the process of this Court arising out of its sovereignty.

3. In that it held that by appearing in this action and answering the libel, this respondent had waived any claim that this Court did not have jurisdiction herein over this respondent as a sovereign power, or over its Steamship "Cunene" as being owned and operated by it as that sovereign.

4. In that it sustained the libelant's exceptions to the respondent's answer herein and directed the entry of an interlocutory decree in favor of the libelant.

5. In that it failed to hold the respondent as a sovereign power or a department of a sovereign government was immune to the process of this Court and that it did not waive any of its rights to suit and immunity for itself or its property or any of its rights of sovereignty by its appearing herein or answering the libel or by any other act.

6. In that it failed to hold that this respondent could properly assert its rights to sovereignty and immunity for itself and its property, to the jurisdiction of this Court at any time during the pendency of this action.

7. In that it failed to hold that because the steamship "Cunene" was represented to *the* public property of the Government of
299 the Republic of Portugal, the said steamship was not subject to attachment herein and that the attachment of the said process herein should not be executed.

8. In that it failed to hold that because the steamship "Cunene" was represented to be public property of the Government of the Republic of Portugal, this Court should not and could not take jurisdiction.

9. In that the Court by directing the entry of an interlocutory decree herein deprived this respondent of its defense of sovereignty.

10. In that it confirmed the report of the Special Commissioner.

11. In that it directed the entry of a final decree herein in favor of the libelant.

12. In that it failed to hold that the defense of sovereignty was a jurisdictional defense which could be asserted at any time and was not waived by a general appearance herein.

13. In that it deprived the respondent of its defense of sovereignty herein.

F. DUDLEY KOHLER,
Proctor for Respondent.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

300 *Stipulation as to Exhibits.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

against

SS. "MORMUGAO," Her Engines, Boilers, etc., Respondent-Appellant.

It is hereby stipulated and agreed that all the exhibits given in evidence at the commissioner's hearing had herein, need not be reproduced in the record herein but may be transmitted in its original form to the Circuit Court of Appeals and may be used by either party on the argument of the appeal with the same force and effect as if said exhibits were included in the transcript of record.

Dated, December 27th, 1921.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Libellant-Appellee.
F. DUDLEY KOHLER,
Attorney for Respondent-Appellant.

301 *Stipulation as to Record.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company. Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Claimant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties for the purposes of this appeal.

Dated, New York, —— —, 1921.

F. DUDLEY KOHLER,
Attorney for Claimant-Appellant.
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Attorneys for Appellee.

302 *Clerk's Certificate.*

United States District Court, Southern District of New York.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Claimant.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of December, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEXANDER GILCHRIST, JR.,
Clerk.

303 *Notice of Motion.*

United States Circuit Court of Appeals for the Second Circuit.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

SIR:

Please take notice that upon the annexed affidavit of Robert S. Erskine, verified the 5th day of January, 1922, and on the printed record in this cause heretofore filed in this court on or about the 31st day of December, 1921, we shall move this Court at the Court Rooms in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on Monday, January 9, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard for an order:

304 1. Dismissing the appeal in this cause or affirming the decree below entered in the office of the Clerk of the United States District Court for the Southern District of New York, on the

16th day of November, 1921, upon the ground that this appeal is without merit as a matter of law, is frivolous and has been taken solely for the purpose of delay.

2. Granting costs to the libelant-appellant and extra damages because of said delay and for such other or further relief as may be just in the premises.

Dated, New York, January 5, 1922.

Yours, etc.,

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant-Appellee.

Office and P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

To F. Dudley Kohler, Esq., Proctor for Respondent-Appellant, Office & P. O. Address, 25 Broadway, Borough of Manhattan, City of New York.

305 *Affidavit of Robert S. Erskine.*

United States Circuit Court of Appeals for the Second Circuit.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

STATE OF NEW YORK,
County of New York, ss:

Robert S. Erskine, being duly sworn, says:

1. I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libelant-appellee herein, and have had entire charge of this action since its inception.

2. This is an appeal from a final decree in admiralty entered in the office of the United States District Court for the Southern
306 District of New York on the 16th day of November, 1921, in favor of the libelant in the sum of $26,716.43.

3. The libel was filed on or about the 1st day of December, 1920, to recover the sum of $24,634.11 for services rendered by the libelant in connection with the discharging and loading of the steamship Cunene at Pier B, Jersey City, for the period of July 14 to August 31, 1920. Process with clause of foreign attachment was issued and the steamship Murmagao was attached as property of the respondent. Respondent appeared and the vessel was released from attachment on the filing of the usual stipulation for value (fols. 36-38). No men-

tion was made either in the bond or appearance of any claim that the respondent, the owner of the vessel, objected to the court below taking jurisdiction over it or over the suit, by reason of the respondent being a foreign sovereign power (fol. 38).

4. Respondent filed its answer on or about the 24th day of December, 1920, and for the first time alleged as a defense that the steamship Cunene was a Portuguese vessel, and was owned and operated by the respondent, which was alleged to be a department of the sovereign foreign government of Portugal; that the matters alleged in the libel relate to the management of the said vessel outside the jurisdiction of the United States, settlement of which should be left to the Portuguese Consul at the port of New York. In the said alleged defense respondent objected and protested to the as-
307 sumption of jurisdiction by the District Court, and alleged that it was a department of the sovereign foreign government of Portugal and cannot be sued in the courts of the United States without its consent (fols. 21-23). Respondent did not deny that the services had been rendered by the libelant and that the amount due had not been paid.

5. Exceptions were duly filed to the answer on the ground that the answer did not state facts sufficient to constitute a defense, and that by appearing generally in the cause and answering the libel any claim that the District Court did not have jurisdiction over the parties to the cause was waived (fols. 28-30 incl.).

6. The exceptions were argued before Honorable John C. Knox, District Judge, together with the exceptions in the suit of Rose against the steamship Murmagao, etc. Judge Knox sustained the exceptions and his opinion is printed at pages 12-16 of the record.

7. An interlocutory decree was entered on the 17th day of August, 1921, and the question of the amount of damages was referred to Ben A. Matthews, Esq., Commissioner (record, pp. 18, 19). Testimony on the question of damages was taken before the Commissioner, who reported the amount due to the libelant to be the sum of $24,634.11, with interest. The respondent offered no evidence before the Commissioner to dispute libelant's right to payment
308 for services rendered, on the merits (fol. 194). The respondent filed exceptions to the report (fols. 196-201 incl.). The exceptions were argued before Honorable Learned Hand and overruled (fols. 202-207) and a final decree was thereupon entered (Record, pp. 70-72 incl.).

8. Respondent served notice of appeal on November 26, 1921, and filed assignments of error on December 5, 1921. The transcript of record was filed in the office of the Clerk of this Court on or about the 31st day of December, 1921.

9. The assignments of error, which are printed on pages 76-78 inclusive, of the record, raise only the question of jurisdiction and the question whether claim of immunity can be inserted after gen-

eral appearance. There are not any errors assigned in connection with the overruling of the exceptions to the commissioner's report. The natural inference, therefore, is that the exceptions to the commissioner's report were filed solely for the purpose of delay.

10. The contentions raised by the appellant are without merit, and it would appear that the appeal is frivolous and interposed solely for the purpose of delay. In the parallel case of Tietjen & Lang Drydock Company against Sao Vicente this Court, in December, 1921, passed upon the same contentions as appellant attempts to raise upon this appeal. In that case, this Court dismissed the ap-
309 peal. These two cases are entirely similar.

Wherefore, I respectfully ask that an order be made herein dismissing this appeal or affirming the judgment of the Court below with costs, and also for extra damages on the ground that this appeal has been interposed solely for the purpose of delay, and that libelant may have such other or further relief as the justice of the cause may require.

ROBERT S. ERSKINE.

Sworn to before me this 5th day of January, 1922.

WM. O. GODDARD,
Notary Public, Kings County.

Certificate filed in New York County.

310 *Order Dismissing Appeal.*

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 19th day of January, 1922.

Present:

Honorable Henry Wade Rogers,
Honorable Martin T. Manton,
Honorable Julius M. Mayer,
Circuit Judges.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

Libelant-appellee having moved this Court for an order dismissing the appeal in this cause or affirming the decree entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 16th day of November, 1921, and grant-

ing costs to the libelant-appellee and extra damages for de-
311 lay; and said motion having come on to be heard on the 9th day of January, 1922, on a notice of motion and affidavit of Robert S. Erskine annexed thereto, verified the 5th day of January, 1922, with proof of service thereof upon the proctor for the claimant-appellant, and on the printed transcript of record from the District Court of the United States for the Southern District of New York heretofore filed in this Court on or about the 31st day of December, 1921, and the proctor for the appellant having, on said 9th day of January, 1922, applied in open court for a stay of the argument of said motion pending re-argument of a similar motion in the suit of Tietjen & Lang Dry Dock Company against the steamship Sao Vicente, and having stated in open court that the only defense involved in this appeal was the same as that involved in the appeal in the said suit of Tietjen & Lang Dry Dock Company, and the Court having heard the re-argument in said suit and having, on the 13th day of January, 1922, affirmed its decision thereon affirming the decree of the District Court.

In consideration whereof, it is now

Ordered, adjudged and decreed that the motion of the libelant-appellee be granted, and that the decree of said District Court be and it hereby is affirmed with costs.

H. W. R.,
M. T. M.,
C. J.

312 *Notice of Settlement.*

United States Circuit Court of Appeals for the Second Circuit.

MAXWELL ROSE, Doing Business under the Trade Names of Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

SIR:

Please take notice that the foregoing order will be presented to one of the Judges of this Court, at the office of the Clerk of this Court in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 18th day of January, 1922, at 11 o'clock in the forenoon for settlement and signature.

Dated, New York, January 14, 1922.

Yours, etc.,

KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctors for Libelant-Appellee.

To F. Dudley Kohler, Esq., Proctor for Claimant-Appellant.

313 *Opinion, Mayer, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

TIETJEN & LANG DRY DOCK COMPANY, Libellant-Appellee,

v.

Steamship SAO VICENTE, Her Engines, etc.; TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

MAXWELL ROSE, Doing Business as Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

v.

Steamship MURMUGAO, Her Engines, etc.; TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

314 MAXWELL ROSE, Doing Business as Battery Operating Company and Whitehall Stevedoring Company, Libellant-Appellee,

v.

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

Before Rogers, Manton, and Mayer, Circuit Judges.

Crowell & Rouse, proctors for Tietjen & Lang, Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes Maritimos do Estado, Claimant-Appellant.
Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Maxwell Rose, etc., Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.
Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Maxwell Rose, etc., Libellant-Appellee.
315 F. Dudley Kohler, proctor for Transportes, Respondent-Appellant.

MAYER, *Circuit Judge:*

The first motion made in this group of cases was a motion on behalf of libelant-appellee in the case of the Sao Vicente to dismiss the appeal.

This motion was granted and we filed a brief memorandum reading:

"This motion to dismiss is granted. The sovereign immunity can be waived and has been waived in this case."

Thereafter, claimant-appellant petitioned for a rehearing, the petition was granted, a rehearing was had and the court adhered to its

previous decision. It was agreed between the proctors that all the cases should follow our decision in the Sao Vicente case. After our decision on rehearing our attention was called to the opinion of the Appellate Division of the Supreme Court for the First Department in De Simone against Transportes Maritimos do Estado and, as it was suggested that our decision was not in harmony with that of the learned Appellate Division, we concluded to point out the views entertained by us more fully than we did in our brief memorandum.

In the Sao Vicente case, the libel was brought by a New Jersey corporation engaged in the business of ship repairing and having its shipyard at Hoboken. The libel, which was veri-
316 fied April 14, 1921, alleged that between March 25th and April 14, 1921, at the port of New York, libelant, at the instance and request of the S. S. Sao Vicente," its officers, etc., furnished materials and supplies in the form of work, labor and services in docking and repairing the steamship amounting in all to $69,000. and that no part of this amount had been paid. Libellant prayed that the usual process should issue. After the vesel had been libelled, the claim of the owner was filed in usual form. It read:

"And now, Transportes Maritimos do Estado, owner of the Steamship "Sao Vicente," etc., intervening for its interest in the said Steamship "Sao Vicente," etc., appears before this Honorable Court and makes claim to the said steamship, &c., as the same are under attachment in this Court * * * and the said Transportes Maritimos do Estado avers that it was in possession of the said Steamship "Sao Vicente" at the time of the issuing of process herein and that it is the true and bona fide owner of the said Steamship "Sao Vicente"; and that no other person is the owner thereof; wherefore it prays to defend accordingly.

TRANSPORTES MARITIMOS DO ESTADO,
By C. B. RICHARDS & CO.
LEONARD W. SIMMONS,
A Partner."

317 This claim was verified by Simmons and acknowledged before a notary, the acknowledgment reading, in part:

"he acknowledged to me that he executed the same for and on behalf of said firm, as agent for Transportes Maritimos do Estado."

The stiplation for value filed the same day was likewise in usual form providing in the condition clause

"if the claimant herein and American Surety Company of New York, of 100 Broadway, Borough of Manhattan, in the City of New York, and by occupation a Surety Company, the stipulation undersigned, shall abide by all orders of the Court, interlocutory or final and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with

interest then this stipulation to be void, otherwise to remain in full force and virtue."

TRANSPORTES MARITIMOS DO ESTADO.
C. B. RICHARDS & CO.,
Agents,
By LEONARD W. SIMMONS,
A Partner."

It is not disputed that the usual stipulation for costs was also filed. Upon filing the claim of the owner and the stipulation for value and the stipulation for costs, the owner procured the release
318 of the vessel from arrest and the vessel is no longer in these waters and hence is no longer in this jurisdiction.

It will be noted that up to this time there was not even the remotest suggestion that the vessel belonged to a foreign sovereign. On May 27, 1921, an answer was verified by Jose Rocha Prista, who swore that he was the Vice Consul-General for the Government of Portugal with an office in the City of New York and that the vessel "as I am informed and believe, is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government * * * the sources of my information and the grounds of my belief as to the matter stated to be alleged upon information and belief are records at the Port of New York and communications received from the agents of the Steamship 'Murmugao.'

The reason this vertification is not made by the respondent is that the respondent is owned by the Transportes Maritimos do Estado, a Department of the republic of Portugal, and is not within the jurisdiction of the United States."

The answer alleged inter alia.

"That the Steamship 'Sao Vicente' is a Portuguese vessel flying the flag or Portugal, owned and operated by Transportes Maritimos do Estado, which is now and at the times mentioned in the libel was a Department of the sovereign government of Portugal, a
319 government now at peace with the United States and allied with the United States * * * and that said vessel is engaged in the public service of Portugal, and that the matters set forth in said libel relate to the management, control and operation of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchant's Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

Respondent objects to, and protests against the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by Transportes Maritimos do Estado, a Department of the sovereign foreign government of Portugal as aforesaid, and that it cannot be sued in any of the Courts of the United States without its consent and that this action is in substance and effect an action against the government of Portugal, and as such is not maintainable against this respondent."

To this answer, libelant duly excepted, the exceptions were sustained by Judge Knox, the usual interlocutory decree was entered and later a special commissioner reported that a stipulation as to damages had been agreed to by the respective proctors and on the basis of that stipulation the special commissioner ordered that the amount due libelant was $67,955.69 with interest from April
320 12, 1921. Thereafter on October 4, 1921, a routine final decree in usual form was entered.

1. Under the Carlo Poma case, 255 U. S., 219, we think that the decree was not appealable to this court.

2. In any event, the jurisdictional question sought to be raised by the answer was not properly raised. The Vice Consul General does not assert that the foreign sovereign government owns the vessel but merely alleges that it is owned by a department of the sovereign foreign government and so far as this record discloses there is nothing in the answer to show that the ownership of the department is the ownership of the sovereign itself. Indeed, the Vice Consul General does not make any assertion on behalf of the Republic of Portugal, but merely states in his affidavit that he is informed and believes that the vessel is owned by a department of the government of the Republic of Portugal and that this information according to the Vice Consul General's affidavit was obtained not from the sovereign under whom he is serving but from some undescribed records at the Port of New York and communications from the agents of another steamship which we happen to know from the other cases is alleged to be owned by this same department.

Even if it were to be held notwithstanding The Pesaro, 255 U. S., 216, that the question of jurisdiction could be raised by the Vice Consul General, it is not properly raised upon this record.

321 3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance. In Beers v. State of Arkansas, 20 How. 527, in speaking of the consent of the State of Arkansas, the court said:

"And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

But this expression must be read in connection with the particular facts of that case, as is illustrated by the following extract from Clark v. Barnard, 108 U. S., 436, at page 447:

"The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the

ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States."

322 We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U. S., 458, where the States expressed declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court."

323 The underlying principle of Clark v. Barnard has been consistently followed.

Gunter v. Atlantic Coast Line R. R. Co., 200 U. S., pp. 284-289;
Porto Rico v. Ramos, 232 U. S., 627;
Richardson v. Fajardo Sugar Co., 241 U. S., 44;
Veita et al. v. Fortuna Estates, 240 F. R., 256, 262.

As succinctly put by Mr. Justice McKenna in the Ramos case, supra, "The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

The two other cases while differing in some details are the same in principle on the questions of appealability and jurisdiction as the Sao Vicente case.

The motions to dismiss the appeals are granted.

324 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 102 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in

the case of Maxwell Rose, doing business, etc., Libellant-Appellee, against Transportes Maritimos Do Estado, Respondent-Appellant as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of February in the year of our Lord One Thousand Nine Hundred and twenty two and of the Independence of the said United States the One Hundred and forty sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

325 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Transportes Maritimos do Estado is appellant, and Maxwell Rose, doing business under the trade names of Battery Operating Company and Whitehall Stevedoring Company, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into
326 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

327 [Endorsed:] File No. 28732. Supreme Court of the United States, October Term, 1921. No. 777. Transportes Maritimos do Estado (in personam), vs. Maxwell Rose, etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1922. William Parkin, Clerk.

328 Supreme Court of the United States, October Term, 1921.

No. 777.

TRANSPORTES MARITIMOS DO ESTADO (in Personam)

against

MAXWELL ROSE, etc.

It is hereby stipulated and agreed by and between the proctors for the parties hereto that the record already certified and filed in the office of the Clerk of the United States Supreme Court in the above entitled cause be taken as the return to the Writ of Certiorari issued herein.

Dated, New York City, April 10th, 1922.

F. DUDLEY KOHLER,
Proctor for Appellant.
KIRLIN, WOOLSEY, CAMPBELL,
HICKOX & KEATING,
Proctor for Appellee.

329 [Endorsed:] Supreme Court of the United States. Transportes Maritimos do Estado (in personam) vs. Maxwell Rose, etc. No. 777. October Term, 1921. Copy. Stipulation. F. Dudley Kohler, Proctor for Claimant, 25 Broadway (Cunard Building), New York City.

330 To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, April 22nd, 1922.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

331 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Transportes Maritimos do Estado v. Maxwell Rose. Return to Certiorari.

332 [Endorsed:] File No. 28,732. Supreme Court U. S., October Term, 1921. Term No. 777. Transportes Maritimos do Estado, &c., Petitioner, vs. Maxwell Rose, &c. Writ of certiorari and return. Filed April 26, 1922.

333 United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

S. S. MURMUGAO, Her Engines, etc., Respondent.

Statement.

Libel Dec. 1, 1920.
Stipulation for Value Dec. 3, 1920, for $24,500, interest $14.70.
Answer Dec. 24, 1920.
Exceptions to Answer Jan. 24, 1921.
Motion to sustain exceptions Jan. 24, 1921.
Decision Denying Motion March 16, 1921, Manton, J.
Order and Notice of Settlement for Preference Nov. 7, 1921.
Order and Notice of Entry Preferring Trial for Nov. 21, rec'd. Nov. 10, 1921.
Order of Substitution Nov. 12, 1921.
Trial Nov. 21, 1921.
Final Decree Nov. 22, 1921.
Notice of Appeal Nov. 26, 1921.
Bond for Costs Nov. 30, 1921.
Bond Add. Security Dec. 5, 1921.
Assignment of Errors Dec. 5, 1921.

334 United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

S. S. MURMUGAO, Her Engines, etc., Respondent.

Libel.

To the Honorable Judges of the United States District Court, Southern District of New York:

The libel of Thomas De Simone against Transportes Martimos do Estado, in a cause of contract civil and maritime, alleges as follows:

First. The libellant is a resident of the City of New York (Kings County) and State of New York and is in business, furnishing supplies, provisions and maritime services to steamships and other vessels in the Port of New York and is engaged in the said business in the Borough of Brooklyn, City of New York.

Second. The Steamship Murmugao, which flies the flag of Portugal, is now or will be during the pendency of process hereunder within this district and the jurisdiction of this Honorable Court.

Third. The libellant on or about the 19th day of August, 1920, at the request of the agents and persons in charge of the
335 Steamship Murmugao, and in reliance upon the credit of the said vessel, furnished certain services to it and sold and delivered to it merchandise consisting of provisions required for the use of said vessel in its port stores, steward department, deck department, its sea stores and other departments of the said vessel, and which said services consisted of the furnishing of transportation for part of said merchandise to the said vessel, all of which was of the agreed price and reasonable value of $23,717.04. That the aforesaid services and goods sold and delivered were necessary to the said vessel, to enable her to clear and make her voyage and to discharge and load her cargo.

Fourth. That bills covering the various items rendered as aforesaid and amounting in all to the aforesaid total were presented to and signed by the captain of the Steamship Murmugao, as evidence that the said goods were actually sold and delivered and that the services were actually rendered, and that the charges were correct. The charges for the said goods sold and said services rendered constitute a lien upon the said ship, by reason of the nature of the said goods so sold and delivered and the said services rendered by the libellant.

Fifth. Although payment of the aforesaid sum has been repeatedly demanded by the libellant from the Steamship Murmugao and her agents, payment has at all times heretofore been refused and the whole of the aforesaid amount is still due and owing to the libellant from the Steamship Murmugao and her owners.

336 Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Steamship Murmugao, her engines, boilers, etc., citing all persons having or claiming to have any interest therein to appear and answer under oath the matters set forth herein; and that the Court will be pleased to grant to the libellant a decree for the aforesaid sum of $23,717.04, with interest thereon from the 19th day of August, 1920, together with the costs of this proceeding; and that the Court will order the Steamship Murmugao, her engines, etc., to be condemned and sold to pay the same; or that the Court will grant to the libellant such other or further relief as to the justice of the cause may require.

CELLER & KRAUSHAAR,
Proctors for Libellant.

Office & P. O. Address, 51 Chambers Street, New York City.

337 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Thomas De Simone, being duly sworn, says:

I am the libellant herein.
The foregoing libel is true of my own knowledge except as to the matters therein stated, to be alleged on information and belief, and as to the same, I believe it to be true.

THOMAS DE SIMONE.

Sworn to before me this 1st day of December, 1920.
[SEAL.] ROSE SCHREINER,
Notary Public, N. Y. Co., No. 824.

Comm. Expires March 30, 1922.

338 *Answer.*

In Admiralty.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of the Steamship Murmugoa, her engines, etc., to the libel in an alleged cause of contract, civil and maritime, brought by Thomas De Simone, respectfully shows to this Court and alleges on information and belief as follows:

I. Respondent denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph marked "First" of the libel.

II. Respondent denies the truth of the allegations contained in the paragraph marked "Second" of the libel, except that it admits that the Steamship Murmugao flies the flag of Portugal, and will be during the pendency of process hereunder within this district.

III. Respondent denies the truth of the allegations contained in the paragraph marked "third" of the libel except that it admits that the libellant on or about the 19th day of August, 1920, furnished certain services to the said vessel and sold and delivered to it certain merchandise.

339 IV. Respondent denies the truth of the allegations contained in the paragraphs marked "Fourth" and "Sixth" of the libel.

V. Respondent denies the truth of the allegations contained in paragraph marked "Fifth" of the libel, except that it admits that payment of the sum alleged has been demanded by the libellant from the Steamship Murmugao and her agents and that payment thereof has been refused.

VI. Further answering the libel herein, and as a separate, distinct and complete defence thereto, respondent alleges upon information and belief:

1. That the Steamship Murmugao is a Portuguese vessel flying the flag of Portugal and is owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

2. Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by the sovereign foreign government of Portugal as aforesaid and that it cannot be sued in the Courts of the United States without its consent.

340 Wherefore, respondent prays that the libel herein be dismissed with costs to the respondent against the libellant and that the Court grant to the respondent such other and further relief as the justice of the case may require.

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Jose Rocha Prista, being duly sworn, says:

I am the acting Consul General for the Government of Portugal with an office in the City of New York in the Southern District of New York. The respondent, as I am informed and believe, is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government.

I have read the foregoing answer and know the contents thereof; that the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief as to the matters stated to be alleged upon information and belief are records at the Port of New York and communications re-
341 ceived from the agents of the Steamship "Murmugao."

The reason this verification is not made by the respondent is that the respondent is owned by the Transportes Maritimos do

Estado, a department of the Republic of Portugal, and is not within the jurisdiction of the United States.

JOSE ROCHA PRISTA.

Sworn to before me this 24th day of December, 1920.

E. H. M.,
Notary Public, New York County, No. 258.

New York County Register's No. 2325.
Commission expires March 30, 1922.

342 *Testimony.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

THE STEAMSHIP MORMUGAO, &c., Respondent.

Before Manton, J.

New York, November 21, 1921—11 a. m.

Appearances:

Meyer Kraushaar, Esq.,
Attorney for the Libellant.
F. Dudley Kohler, Esq.,
For the Respondent.

(Opening statements by counsel.)

THOMAS DE SIMONE, called as a witness in his own behalf, was first duly sworn and testified as follows:

Direct examination.

By Mr. Kraushaar:

Q. Mr. De Simone, what is your business?
A. I am a ship chandler.
Q. How long have you been in that business?
A. Since 1895.
Q. And you have your place of business where?
A. At that time it was No. 3 President Street. At the present time it is 971 Third Avenue.

343 The Court: Where was it in August, 1920?
The Witness: 971 Third Avenue.

Q. Did you do business with the Transportes Maritimos prior to and in September, 1920?

Mr. Kohler: I object to that: He has not yet shown who they are.

Q. Do you know the Transportes Maritimos?
A. Yes, very well.

Mr. Kohler: I object to that. He is not qualified yet to testify to that.
The Court: How do you know that?

Q. How do you know that?
A. Through the captains that came in, and the agent also.
Q. Who were the agents?

Mr. Kohler: I object to that as hearsay.
Mr. Kraushaar: I will connect it.
The Court: I will take it. Overruled.
Mr. Kohler: Exception.

Q. Who were the agents at that time of the Transportes Maritimos?
A. Roderick & Rumsey.
Q. Where were their offices?
A. 10 Bridge Street.
Q. In September, 1920, did you have anything to do with the S. S. Mormugao, then in the port of New York?
A. Yes, sir.
Q. Did you sell a lot of merchandise to that ship?
A. Yes, sir.

344 Mr. Kraushaar: In the libel it is admitted that the goods were sold; but the amount and reasonable value is denied.

Q. Now, Mr. De Simone, I hand you herewith certain papers, and ask you whether or not you were present when the various officers of the described vessels signed these papers?
A. Yes, sir, they were signed on board th- ship, the captain.

The Court: What ship?
The Witness: On the Mormugao and each ship of the name that we delivered the goods to.
The Court: Did you deliver all of the merchandise yourself?
The Witness: My man delivered the goods, and signed by the captain or purser.
The Court: That is, the merchandise enumerated on the paper which you have in your hand?
The Witness: Yes, sir.
Mr. Kohler: I object to it on the ground that it has not been properly proven.
The Court: He will connect that later on.
The Witness: This was the man that delivered the goods himself (indicating).
The Court: I will take it subject to connection.

Q. Now, did the captain of the vessel sign these papers?
A. Yes, sir.
Q. How many of these papers were signed?
A. There is three duplicates.
Q. This paper I show you is a triplicate of the two others
345 which were made out similarly?
A. Yes, sir.
Q. What happened to the other two papers?
A. Two I think Roderick & Rumsey gets them and takes care of them.

Mr. Kohler: I object to that.
The Court: Overruled.

Q. Did Roderick & Rumsey get the other two copies?
A. Yes, sir.

The Court: Who were they?
Mr. Kraushaar: They were the agents of the ship.
Mr. Kraushaar: I offer these in evidence.
Mr. Kohler: I object to them on the ground that they have not been properly proved.
The Court: Mark them for identification.

(The same were marked Libellant's Exhibit No. 1 for Identification.)

Q. I call your attention to this bill, Libellant's Exhibit No. 1 for Identification——

The Court: What is that—the supplies to what ship?
Mr. Kraushaar: The Mormugao.

Q. (Continuing:) On the first page, the item of 36 coils one inch asbestos cable 1,800 pounds at $1.25 a pound, $225. Did you personally see those 36 coils delivered to the ship?
A. They were delivered, yes, sir.
Q. In your presence to the ship?
A. Yes, sir.
346 Q. Now, Mr. De Simone, I call your attention to the fact that the 1,800 pounds equals the sum of $2,250. That was an error?
A. Yes, sir.
Q. In this bill (indicating)?
A. Yes, sir.
Q. Now, who called your attention to this error?
A. Roderick & Rumsey's bookkeeper.
Q. And did you deliver to Roderick & Rumsey a corrected bill?
A. I put an addition to the bill. Of course, at the time the bill was signed by the captains, the bill signed, the ship had sailed, and next day we discovered that error.
Q. And you sent to Roderick & Rumsey an additional bill for $2,025?
A. Yes, sir.

Q. I also call your attention to another error in this bill, Libellant's Exhibit No. 1 for Identification with reference to 60 pounds of ½ inch, ⅝ inch and ⅞ inch water backing, at a dollar. That was figured in the bill at $6. Did you see those goods actually delivered to the ship?

A. Yes, sir.

Q. That was an error, wasn't it?

A. Yes, sir.

Q. It should have been $60?

A. Yes, sir.

Q. That was another error that was discovered?

A. Yes, sir.

Q. And that was also—you sent a duplicate bill to Roderick & Rumsey on that?

A. Yes, sir, at the same time.

Mr. Kohler: I object to that.

Mr. Kraushaar: I will connect it later.

The Court: I will take it subject to the connection.

Q. Did you see the goods delivered to the engine department, described in this Libellant's Exhibit No. 1 for Identification?

A. Yes, sir.

347 Q. Did you supervise the delivery of these goods?

A. Yes, sir.

Q. And you were present at the time they were delivered?

A. Yes, sir.

Q. And the goods described as port stores, did you see them delivered?

A. Yes, sir, oh yes.

Q. You were present when each item was put aboard the vessel?

A. Yes, sir.

Q. The steward department, were you present when those were delivered?

A. Yes, sir.

Q. And who was there as well as you?

A. The driver.

Q. Mr. Castellano?

A. Yes, sir, right here (indicating).

Q. And as to the deck department?

A. The same thing.

Q. You were present and saw these delivered?

A. Yes.

Q. And the sea stores?

A. The same thing.

Mr. Kraushaar: I now offer these papers in evidence.

Mr. Kohler: I object to it on the ground that it has not been properly proved. He has not proved the fair and reasonable value of the items.

Mr. Kraushaar: I will prove that. There is an admission against interest—the signature of the captain.

The Court: Did the captain sign that?
The Witness: Yes, sir, in my presence.
The Court: You may mark it.

(The same was marked in evidence as Libellant's Exhibit No. 1.)

Q. Have you read the items in this bill?
A. Yes, sir.
348 Q. I notice there are certain charges against the items, for instance, five barrels of No. 1——

The Court: Have you figured each item in the bill?
The Witness: Yes, sir.
The Court: And are the values placed there the fair and reasonable price of the goods sold and delivered?
The Witness: Yes, sir, on the market at the time.
The Court: Have you figured out the total of the property you delivered?
Mr. Kraushaar: I will show you the paper to refresh your recollection on that.
I want to prove another item.

Q. After the ship sailed did you also send the bill to Roderick & Rumsey which I now show you?
A. Yes, sir, Roderick & Rumsey forwarded that to Portugal.
Q. This bill reads fifteen trips to steamship?
A. Yes, sir.
Q. Tell us how that bill was made up? How you arrived at that?
A. We made this bill because when the steamer stood out in the stream and they ordered goods to be sent on board we naturally had to get a launch to deliver those goods.
Q. And these goods which are described in Libellant's Exhibit No. 1 were delivered either on the dock?
A. Yes, sir.
Q. Or, later, alongside the ship in the stream?
A. Yes.
Q. How many trips did you have to make?
A. Fifteen trips.
349 Q. And how much at that time was the fair and reasonable price of that?
A. We made a special price, cheaper than the general price.
Q. What was the price you made?
A. Fifteen dollars.
Q. What was the regular price?
A. They charged $25, some of them.
Q. And you also sent that bill to Roderick & Rumsey?
A. Yes, sir.
Q. And this is a duplicate of the bill you sent them?
A. Yes, sir.

Mr. Kraushaar: I offer that bill in evidence.
Mr. Kohler: I object to it on the ground that it has not been properly shown that that was the fair and reasonable value.

The Court: I will take it. Objection overruled.
Mr. Kohler: Exception.

Q. The total of all these charges is how much?
A. Three hundred——
Q. I mean all on Libellant's Exhibit No. 1, the goods you delivered to the ship?
A. It is $23,717.04.

The Court: When was that due? When were those deliveries made? What is the date of the deliveries.
Mr. Kraushaar: I will show you the bill to refresh your recollection.
Mr. Kohler: I object to it on the ground that he read those details from a ship of paper other than the bills.
Mr. Kraushaar: Well, I will show you what the slip is.
350 It was just done on the adding machine.
Mr. Kohler: There is no connection between the slip and the bills.
The Court: Is that correct, as represented by the bills?
The Witness: Yes, sir.
The Court: That is all that is necessary.

Q. What date is that they were delivered?
A. It is different dates.
Q. About when were they all finally delivered?
A. Just what the bill called for, in September and August, on those dates.

The Court: 1920?
The Witness: Yes, sir.

Q. But the bills were not rendered until the 2nd of September, 1920?
A. The 2nd of September.

Mr. Kraushaar: That is all for this witness on this case. If you are to cross examine him, you may do so.

Cross-examination.

By Mr. Kohler:

Q. This bill dated September 2, 1920, for the SS. Mormugao, were these goods in the bill delivered under your supervision?
A. Yes, sir.
Q. At whose request or instance were they delivered?
A. The purser.
Q. Of the ship?
A. Yes, sir, gave us the orders to deliver such a day.
Q. Did the purser of the ship come ashore to order these goods?
A. Yes, sir, the purser or the steward, or sometimes both of them.

351 Q. They were not ordered then f-om the agents of the vessel?

A. No, not from the agent, no, sir.

Q. Did you make any agreement with the purser of the ship regarding the sale of these goods to the ship?

A. Yes, sir.

Q. What was that?

A. You mean the price?

Q. Well, yes.

A. When they ordered the goods we set the price.

Q. Now, it is customary in supplying a ship with goods, to give a bonus to the officer of the vessel ordering the goods?

Mr. Kraushaar: I object to that on the ground that it is immaterial, irrelevant and incompetent.

The Court: I will take it. Overruled.

A. No, sir.

Q. Did you pay any bonus to the captain or purser of the vessel for ordering these goods?

A. No, sir.

Q. They received no commission at all from you?

A. No.

Q. Now, you have an item here of 36 coils of No. 1 asbestos cable $225. Is that a fair and reasonable price for that item?

A. Well, there was an error there; it would be more than that.

Q. It is more than that?

A. Yes, sir.

Q. You say this is an error?

A. That was an error.

Mr. Kraushaar: Let me call your attention to the fact that if you figure it out you will find that the amount should be $2,250, because 1,800 at $1.25 makes $2,250.

352 Q. Did you make this bill up yourself, Mr. De Simone?

A. The girl makes it, the typewriter. I make the price and the girl copies it.

Q. Have you any receipts to show that the goods on this bill were actually delivered to the ship?

A. Yes.

Q. They are not on this bill, are they?

A. No, sir.

Q. Have you got those slips?

A. Not with me. On the ships they generally take a copy of these receipts, and then if they are on the other side or Roderick & Rumsey has them I don't know.

Q. Didn't you keep receipts of each item of goods that you delivered?

A. Yes, sir.

Q. And you haven't got them in court?

A. No, sir. Sometimes when there is everything signed we some-

times destroy them. I must have them home. If they are not there they may have been destroyed, some of them.
Q. You don't destroy the receipts, do you?
A. Unless we need them. When we get the original bill we don't need the receipts any more.
Q. You say there was another item on which there was an error?
A. Yes, sir, $60. That was made $6 instead of $60.

Mr. Kohler: I would like to make an objection to the admission of these papers on the ground that they have not supplied us here with the receipts for the goods which the libellant says he has delivered, and which he has not produced here in court.
Mr. Kraushaar: They don't keep the original receipts. When the captain of the vessel receives them and signs for them, that is proof positive that they were actually received. It is a custom of the business.
The Court: What you offer now is what the captain signed?
Mr. Kraushaar: Yes.
The Court: Objection overruled.
Mr. Kohler: I take an exception on the ground that there is nothing to prove that the captain signed for each item in this long list of items, that he checked up each item when he signed this long bill.
The Court: Well, if he didn't receive it that is his misfortune.

Redirect examination.

By Mr. Kraushaar:

Q. Did you check up each item of the bill when signed?
A. Yes, sir, checked with the purser and the steward, and then the captain signs.
Q. They had their other receipts at the time?
A. Yes, sir; on board, the copy of those same receipts, and checked them on board.

Mr. Kraushaar: That is all.
Mr. Kohler: That is all.

CHARLES NEUBURG, called as a witness by the libellant was first duly sworn and testified as follows:

Direct examination.

By Mr. Kraushaar:

Q. Are you connected with Roderick & Rumsey?
A. Yes.
Q. How long have you been connected with them?
A. Since October, 1918.
Q. What is your business with respect to them?
A. Cashier and bookkeeper.
Q. What do your duties as bookkeeper include with reference to the steamships you represent?

A. It includes checking up the bills as they come in and getting them ready for payment.

Mr. Kohler: I object to that. The witness has not been qualified.
The Court: He is trying to do that now.
Mr. Kohler: He has not shown that he has any connection with the agents of the ship.
The Court: Objection overruled.
Mr. Kohler: Except that he is cashier.
The Court: Proceed.
Mr. Kohler: Exception.

Q. Do you know anything about the relations between Roderick & Rumsey and the Transportes Martimos?
A. We were appointed agents of the Transportes Martinodos and we——

Mr. Kohler: I object to that.

A. (Continuing:) And we contracted for cargoes, passengers, etc., which began in 1919, September, and expired September, 1920.
Q. The end of September, 1920?
A. September 5th.

The Court: During the period mentioned did you buy supplies for the ships of the company?
The Witness: It was customary for the supplies that Mr.
355 De Simone furnished to be ordered by the officers.
Q. By the officers?
A. On board the boat.
The Court: But during this period from September, 1919 to September, 1920, did your firm act as agent for the ships?
The Witness: For the Transportes Maritimos, yes, sir.
The Court: The ships belonging to this company?
The Witness: Yes, sir.
Q. Your agency was to secure cargo for these vessels brought in by water?
A. Yes, sir.
Q. Secure her freight?
A. Yes, sir.
Q. And collect moneys that were due?
A. Yes, sir.
Q. What did you do with the moneys received in that way?
A. Why——

Mr. Kohler: I object to that. This witness should be an officer of Roderick & Rumsey.

The Court: Not necessarily. You took care of that work for them, personally?
The Witness: Yes, sir.
Q. What did you do with the moneys you received in that way?
A. Well, we used it, that is to the amount of it, against current bills.

Q. By current bills, what do you mean?
A. All kinds of bills, pilotage, and other supplies.
Q. During that period of prior to the 2nd of September, 1920, did you pay De Simone any money for goods which he supplied to the various steamships of the Transportes Martimos?
356 A. Wells, we paid out anything we had on hand, but we couldn't pay everything in full, and where we ran a little short we expected our principals to furnish the money to pay these supplies.
Q. As to the Steamship Mormugao, were there duplicates or rather a triplicate of the original bills signed by the masters of the various vessels?
A. Yes, sir.
Q. Are you familiar with the signatures of these officers?
A. Yes, sir.
Q. I show you Libellant's Exhibit No. 1 and ask you whether the signatures at the end of that are the genuine signatures of the officers?

Mr. Kohler: I object to that. The witness didn't see them sign.

The Court: Did you see them sign, first of all?
The Witness: No, sir.
The Court: Do you know the handwriting?
The Witness: Yes, sir, I know the handwriting.
The Court: What is the name there? (indicating).
The Witness: Verdine.
The Court: Did you ever see him write?
The Witness: Yes, sir, for cash advances, and he would sign for them; and also the other officers would come in and get advance money.
The Court: Is that Verdine's signature to that bill, Libellant's Exhibit No. 1?
The Witness: Yes, sir.
357 Q. Look at every one of these signatures and tell us who they are?
A. Verdine is the captain, and the first engineer is Hausner.
The Court: Did you see him sign his name?
The Witness: Not to this bill, but I have seen his name signed.

Q. Look at each of the signatures at the ends of those sheets and tell us who they are?
A. First engineer, Hausner; and Captain Verdine, and also the signature of the purser with the seal of the boat.
Q. Did you receive any more originals or papers in connection with this?
A. We received the original duplicates which were forwarded to the principals, and we received one office copy, necessarily, which we kept for our files.
Q. Did you check up the duplicates?
A. Yes, sir, we checked up the original and compared the original with the billing—well, of course, this is a carbon copy, and naturally a duplicate will be the same as the original.

Q. Did you find any errors with regard to the steamer Mormugao?
A. Yes, sir.
Q. What did you find?
A. In regard to the cable, which I called Mr. De Simone's attention to.
Q. I show you this paper and ask you what you found as a result of your checking in regard to the water backing?
A. I found an error there, it should be $60 and also an error in the extension.
Q. Did you receive the original of this paper from Mr. De Simone?
A. Yes, sir.
Q. What became of that?
358 A. The original was sent to the Lisbon office, with a letter which I dictated.
Q. Is this the letter which you sent to the Lisbon office?
A. Yes; that is the original copy.
Q. Did you mail that letter yourself?
A. Yes, sir.
Q. How much postage did you put on it?
A. Five cents postage.

Mr. Kraushaar: I offer this duplicate letter in evidence.
Mr. Kohler: It don't appear to have been signed by anybody and don't say who wrote it.
Mr. Kraushaar: That is a copy.
The Witness: The original was signed by Roderick & Rumsey just signed as agents.
Mr. Kohler: I object to it on the ground that it is immaterial irrelevant and incompetent.
The Court: Objection overruled.
Mr. Kohler: Exception.

Q. Were your accounts as agents of the Transportes Maritimos audited at the instance of the Transportes Maritimos at any time?
A. At the instance of the Transportes Maritimos and of counsel Mr. Patterson.
Q. And did they go over the bills, did the auditor go over the things?
A. Yes, sir; Price, Waterhouse & Co. made an exhaustive audit.
Q. I show you this paper and ask you if that is not the report that you received from Price, Warehouse & Co.?
A. Yes, sir.
359 The Court: Does that refer to this account?
Mr. Kraushaar: Yes, sir.
The Witness: Yes, sir; this is a copy.

Q. How much did the account show was due Mr. De Simone by the Mormugao?
A. I would have to refresh my memory on that.
Q. Can you examine it? Does that report show it?
A. The report shows it; it is here in the latter part (examining paper).

The Court: Well, you have the figures.
Mr. Kraushaar: Yes, sir; I will not bother about that.

Q. The account shows the total indebtedness?
A. Yes; shows the total indebtedness, a balance due of $89,931.24.
Q. So that they didn't have enough to pay Mr. De Simone for these claims?
A. No, sir.

Mr. Kraushaar: That is all.

Cross-examination.

By Mr. Kohler:

Q. You paid Mr. De Simone some moneys on account?
A. There was one steamer which came in in January or February, 1920, the Goao.
Q. Was there a balance there unpaid?
A. Of Mr. De Simone?
Q. Yes.
A. No, sir.
Q. Did you pay him any moneys on the Mormugao?
A. No.
Q. Now, these supplies that you just saw the list of, were they ordered by the officers of the vessel?
A. Yes, sir.
360 Q. And at that time your firm of Roderick & Rumsey were the agents of this steamship line?
A. Yes, sir.
Q. Then did you transport or transfer moneys that you received on the sale of tickets to this steamship line's main office in Portugal?
A. We transferred no money; we paid it out through the Guaranty Trust Company for disbursement purposes.
Q. At no time you transferred moneys to the Portuguese office?
A. No, sir; we never had sufficient receipts to do so.
Q. Did you receive communications from the Portuguese office or company or line, at any time? Did you receive any communications from them?
A. Oh, yes, we were in constant communication.
Q. How did you communicate with them there?
A. With the Commissioner, Augustine Mines Robeiro, director of the Company.
Q. Director of what?
A. The Transportes Maritimos.
Q. Do you know what his official capacity is?
A. Why, I understand that he is a director, or what we would call probably general manager in this country.
Q. Do you know what the Transportes Maritimos is in Portugal?
A. I understand it is a separate corporation, with a charter from the government, so far as we understand it.
Q. How do you understand that? Who told you that?

A. I understand that from Roderick & Rumsey.
Q. Did they tell you that?
A. So I understand.
Q. Well, you say you understand. Do you know?
361 want to know who told you.
A. That was what was told me.
Q. Who told you that?
A. The firm, they having known these people a good while.
Q. Which one of the firm told you that?
A. Mr. Rumsey.

Mr. Kohler: That is all.
The Court: Have you the principal and interest?
Mr. Kraushaar: Yes, sir.
The Court: How much?
Mr. Kraushaar: $1,786.69, and a total of $25,503.73.
That ends the Mormugao case. Now, I can prove the other case.
The Court: All right.

(Opinion for both cases at end of testimony in other case.)

362 *Decree.*

At a Stated Term of the District Court of the United States for the Southern District of New York held in the Post Office Building in the Borough of Manhattan, City of New York, on the 21st day of November, 1921.

Present: Hon. Martin T. Manton, U. S. Circuit Judge.

THOMAS DE SIMONE, Libellant,

against

SS. "MORMUGAO," Her Engines, Boilers, etc., Respondent.

This cause having been heard on the pleadings and proofs, and having been argued and submitted by the advocates for the respective parties, and due deliberation having been had;

It is, now on motion of Celler & Kraushaar, Esqs., Proctors for Libelant,

Ordered, adjudged and decreed by this Court, that the libelant above named, Thomas De Simone, recover against the SS. "Mormugao," her engines, boilers, etc., the sum of $23,717.04, with interest thereon from the 19th day of August, 1920, to wit; the sum of $1,786.69, making a total of $25,503.73, together with the
363 sum of $27.50, costs as taxed, amounting in all to the sum of $25,531.23, and that said SS. "Mormugao," her engines, boilers, etc., be condemned to pay the same, and it is further

Ordered, adjudged and decreed that unless an appeal be taken from this decree within the time limited by the rules and practice

this Court, the stipulators for costs and value on the part of the claimant of said SS. "Mormugao," her engines, boilers, etc., do cause the engagements of their stipulations to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands for the amount of their said stipulations.

Enter.

MANTON,
U. S. Circuit Judge.

364 *Notice of Appeal.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

Steamship "MORMUGAO," Her Engines, etc., Respondent.

SIRS:

Please take notice that the Transportes Maritimos do Estado, respondent in the above entitled action, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from a final decree of this Court, filed and entered on the 22nd day of November, 1921, and from each and every part thereof.

Dated, New York, November 25th, 1921.

Yours, etc.,

F. DUDLEY KOHLER,
Proctor for Respondent.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

To Celler & Kraushaar, Esqrs., Proctors for Libellant, 51 Chambers Street, New York City.

365 *Assignment of Errors.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

Steamship MORMUGAO, Her Engines, etc., Respondent.

The respondent of the Steamship Mormugao, appellant herein assigns errors to the findings, decision and decree of the District Court herein, in the above-entitled action as follows:

1. In that it held that by appearing in this action and answering the libel, this respondent had waived its claim to immunity to the process of this Court arising out of its Sovereignty.

2. In that it held that by appearing in this action and answering the libel, this respondent had waived any claim that this Court did not have jurisdiction herein over this respondent as a Sovereign Power, or over its Steamship Mormugao as being owned and operated by it as that Sovereign.

3. In that it failed to hold that the respondent as a Sovereign Power or a department of a sovereign government was immune to the process of this Court and that it did not waive any of its rights to suit and immunity for itself or its property or any of its
366 rights of sovereignty by its appearing herein or answering the libel or any other act.

4. In that it failed to hold that this respondent could properly assert its rights to sovereignty and immunity for itself and its property, to the jurisdiction of this Court at any time during the pendency of this action.

5. In that it failed to hold that because the Steamship Mormugao was represented to be public property of the Government of the Republic of Portugal, the said steamship was not subject to attachment herein and that the attachment of the said process herein should not be executed.

6. In that it failed to hold that because the Steamship Mormugao was represented to be public property of the Government of the Republic of Portugal, this Court should not and could not take jurisdiction.

7. In that it directed the entry of a final decree herein in favor of the libellant.

8. In that it failed to hold that the defense or sovereignty was a jurisdictional defense which could be asserted at any time and was not waived by a general appearance herein.

9. In that it deprived the respondent of its defense of sovereignty herein.

10. In that it failed to dismiss the libel against the Steamship Mormugao in this action when libellant testified that he knew
367 at the time of selling merchandise to the respondent that the Steamship Mormugao was the property of and operated by the Sovereign Government of the Republic of Portugal.

11. In that the Court failed to sustain the objections of the respondent at the trial.

12. In that it failed to grant the motion of the respondent to dismiss the libel at the trial.

13. In that it did not permit respondent to offer any evidence or proof as a defense that respondent was and is the sovereign government of the Republic of Portugal.

F. DUDLEY KOHLER,
Proctor for Respondent.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

368 *Notice of Appearance.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

SIRS:

Please take notice that the respondent above named hereby appears in the above entitled suit and that I am retained as Proctor for it herein.

Dated, December 13th, 1920.

Yours, etc.,

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

To Celler & Kraushaar, Esqs., Proctors for Libelant, 51 Chambers Street, New York City; Alexander Gilchrist, Clerk.

We consent to the transfer of the balance of funds deposited with the clerk, to Frank M. Patterson.

369 *Stipulation for Value.*

Entered into pursuant to the Rules and Practices of this Court.

District Court of the United States for the Southern District of New York.

Whereas, a libel was filed on the 1st day of December, 1920, by Thomas de Simone, against Steamship "Murmugao," her engines, etc., for the reason and causes in the said libel mentioned; and

Whereas, The issuing of process herein has been waived in consideration of the claimant of said vessel filing due claim thereto, and also stipulations for costs and value, the latter in the sum of Twenty Four Thousand Five Hundred ($24,500.00) dollars, the agreed value thereof, as appears from the stipulation at the foot

hereof; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its surety execution for the above agreed amount, with interest thereon from this date, may issue against their goods, chattels and lands.

Now, therefore, The condition of this stipulation is such that if the claimant herein and American Surety Company of New York, of 100 Broadway, Borough of Manhattan, in the City of New York, and by occupation a Surety Company, the *stipulation* undersigned, shall abide by all orders of the Court, interlocutory or final and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest,
370 then this stipulation to be void, otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK,
By F. G. MERRILL,
Resident Vice-President.

Attest:
[L. S.] JAMES J. LUCY,
Resident Assistant Secretary.

STATE AND COUNTY OF NEW YORK, *ss:*

On this 3rd day of December, 1920, before me personally came F. G. Merrill, known to me to be the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the annexed bond of Transportes Maritimos Do Estado, as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the Resident Vice-President of the American Surety Company of New York, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, and as amended March 23, 1910, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Transportes Maritimos Do Estado, is the corporate seal of the American Surety Company of New York, and was thereto affixed by order and authority of the Board of Trustees of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with
371 James J. Lucy, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said James J. Lucy, subscribed to said bond is in the genuine handwriting of said James J. Lucy, and was thereto subscribed by order and authority of said Board of Trustees, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Five Million Dollars ($5,000,000.00).

F. G. MERRILL.

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of December, 1920.

[L. S.]

H. M. HESS,
Notary Public, Bronx County, No. 25.

Register No. 2244.
Certificate filed in New York County No. 256.
Register's No. 2215.
Kings County 143.
Certificate filed in Queens, Richmond, Westchester and Ulster Co.
Term expires March 30, 1923.

372 *Stipulation as to Record.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

Steamship MORMUGAO, Her Engines, etc., Respondent.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties for the purposes of this appeal.

Dated, New York, January 4, 1922.

F. DUDLEY KOHLER,
Attorney for Appellant.
CROWELL & ROUSE,
Attorneys for Appellee.

373 *Clerk's Certificate.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

Steamship MORMUGAO, Her Engines, etc., Respondent.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern Dis-

trict of New York, this — day of December, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEXANDER GILCHRIST, JR.,
Clerk.

374 *Notice of Motion.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libellant-Appellee,

against

S. S. MURMUGAO, Her Engines, etc., Respondent-Appellant.

Please take notice that upon the annexed affidavit of Meyer Kraushaar, verified the 7th day of January, 1922, and on the printed record in this cause heretofore filed in this Court on or about the 4th day of January, 1922, we will move this Court at the Court Rooms in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on Monday, the 16th day of January, 1922, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order:

1. Dismissing the appeal in this cause, or affirming the decree below, entered in the office of the Clerk of the United States District Court, for the Southern District of New York, on the
375 21st day of November, 1921, upon the ground that this appeal is without merit as a matter of law, is frivolous, and has been taken solely for the purpose of delay;

2. Granting costs to the libellant-appellee, and extra damages because of such delay, and for such other and further relief as may seem just in the premises.

Dated, New York, January 7th, 1922.

Yours, &c.,

CELLER & KRAUSHAAR,
Proctors for Libellant-Appellee.

Office & P. O. Address, 51 Chambers Street, Manhattan Borough New York City.

To F. Dudley Kohler, Esq., Proctor for Claimant-Appellant, 2 Broadway, New York City.

376 *Affidavit of Meyer Kraushaar.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libellant-Appellee,

against

S. S. MURMUGAO, Her Engines, etc., Respondent-Appellant.

CITY AND COUNTY OF NEW YORK, *ss:*

Meyer Kraushaar, being duly sworn, deposes and says:

1. I am a member of the firm of Celler & Kraushaar, Proctors for the Libelant-Appellee herein, and have had entire charge of this action since its inception.

2. This is an appeal from a final decree in Admiralty, entered in the Office of the United States District Court, for the Southern District of New York, on the 21st day of November, 1921, in favor of the Libelant for the sum of $25,531.23.

3. The libel was filed on or about the 1st day of December,
377 1920, for $23,717.04, for goods sold and delivered by the libelant in connection with provisioning the Steamship Murmugao.

4. The vessel Murmugao was arrested, and was released from arrest on filing the usual stipulation for value (fols. 109-117).

5. A notice of appearance was also filed in this suit (fols. 94-96). No mention was made either in the bond or in the notice of appearance, of any claim that the owner objected to the Court below taking jurisdiction over it or over the suit by reason of such owner being a foreign sovereign power.

6. Claimant filed its answer herein on or about the 24th day of December, 1920, and for the first time alleged as a defense, that the Steamship Murmugao was a Portuguese vessel, and was owned and operated by the Transportes Maritimos Do Estado, which was alleged to be a Department of the foreign sovereign Government of Portugal; that the matters alleged in the libel relate to the management of said vessels outside of the jurisdiction of the United States, settlement of which should be left to the Portuguese Consul at the Port of New York. In said alleged defense, the respondent objected and protested to the assumption of the jurisdiction by the District Court, and alleged that said vessel was owned and operated by the sovereign Government of Portugal, and cannot be sued in the Courts of the United States without its consent (fols. 20, 22).

378 7. By special order of the Court dated November 21st, 1921, made by the Hon. Martin T. Manton, District Judge, this case was set down specially for trial before him on the 21st day of No-

vember, 1921, and Judge Manton took testimony in support of the libelant's claim, and ruled as follows:

"I will give a decree for libelant in the case of De Simone vs. S. S. Murmugao for the amount in full with interest amounting to $25,503.73, a-d I will grant a decree against the corporation for the full amount of $17,775.62. The Court finds it in that way rather than send this matter to a commissioner to take proof as to the damages. The respondent having appeared and answered generally, it cannot avail itself of that part of the answer which sets up a special defense of sovereignty in the ownership and operation of the vessel. We might have stricken out that part of the answer, and sent the matter to a Master to ascertain the damages. But in view of the fact that libelant has been deprived of what unquestionably is his, the full amount here awarded to him, he should not be further delayed but is entitled to a decree. This is particularly the case in view of counsel's admission that he cannot and will not contest the delivery of
379 the goods or the amount which is claimed to be due and owing to him. Decree may be presented accordingly.

I decline to further postpone because the proof which counsel for the respondent suggests he would offer from the Portuguese Consul would not change the result as long as I hold that the defense of sovereignty ownership is not available at this time to either of the respondents."

6. The contentions raised by the appellant are without merit, and it would appear that the appeal is frivolous and interposed solely for the purpose of delay. In the parallel case of Tietjen & Lang Drydock Company against Sao Vicente, this Court, in December, 1921, passed upon the same contentions as the appellant attempts to raise on this ap-eal. In that case, this Court dismissed the appeal. This case is precisely similar.

7. The transcript of record was filed in the Office of the Clerk of this Court on January 4th, 1922.

Wherefore, I respectfully ask that an order be made herein dismissing this appeal or affirming the judgment of the Court below with costs, and also for extra damages on the ground that the appeal has been interposed solely for the purpose of delay, and that
380 the libelant may have such other and further relief as the justice of the Court may require.

MEYER KRAUSHAAR.

Sworn to before me this 7th day of January, 1922.

ETTA OLEON,
Notary Public, New York City.

Kings Co. Clk.'s No. 114; Kings Co. Reg. No. 8018.
N. Y. Co. Clk.'s No. 153; N. Y. Co. Reg. No. 8119.
Term expires March 30, 1925.

381 *Order Dismissing Appeal.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libellant-Appellee,

against

S. S. MURMUGAO, Her Engines, etc., Respondent-Appellant.

The usual four days' notice of settlement is hereby waived, and it is agreed that the annexed proposed order may be presented for settlement on the 16th day of January, 1922, at 11 o'clock in the forenoon of that day, to the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, at his office, in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York.

Dated, New York, January 14th, 1922.

F. DUDLEY KOHLER,
Proctor for Respondent-Appellant.

382 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 16th day of January, 1922.

Present:

Hon. Henry Wade Rogers,
Hon. Julius M. Mayer,
Circuit Judges.

THOMAS DE SIMONE, Libellant-Appellee,
against

SS. MURMUGAO, Her Engines, etc., Respondent-Appellant.

Libellant-Appellee having moved this Court for an order dismissing the appeal in this cause or affirming the decree entered in the Office of the Clerk of the United States District Court, for the Southern District of New York, on the 21st day of November, 1921, and granting costs to the libelant-appellee and extra damages for delay; and said motion having come on to be heard on the 13th day of January, 1922, on a notice of motion and affidavit of Meyer Kraushaar
383 annexed thereto, verified the 7th day of January, 1922, with proof of service thereof upon the proctor for the claimant-appellant, and on the printed transcript of record from the District Court of the United States, for the Southern District of New York, heretofore filed in this Court on or about the 4th day of January, 1922, and the proctor for the appellant having stated in open Court

that the same questions were involved as in the suit of Tietjen & Lang Dry Dock Company against The Steamship Sao Vicente, and having stated in open Court that the only defense involved in this appeal was the same as involved in the appeal in the said suit of Tietjen & Lang Dry Dock Company, and the Court having heard the re-argument in said suit, and having, on the 13th day of January, 1922, affirmed its decision thereon, affirming the decree of the District Court,

In consideration whereof, it is now

Ordered, adjudged and decreed, that the motion of the libelant-appellee be granted, and that the decree of the said District Court, be and the same hereby is affirmed with costs.

HENRY WADE ROGERS,
C. J.

384 *Opinion Mayer, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libellant-Appellee,

v.

Steamship MURMUGAO, Her Engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

THOMAS DE SIMONE, Libellant-Appellee,

v.

TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

Before Rogers and Mayer, Circuit Judges.

Celler & Kraushaar, proctors for De Simone, Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.
Celler & Kraushaar, proctors for De Simone, Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.

MAYER, *Circuit Judge:*

Motions to dismiss the appeals are granted for the reasons stated in the Sao Vicente and other cases against the same appellant filed herewith.

385 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 52 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Thomas De Simone, Libellant-Appellee, against SS. Mur-

magoa, her engines, etc., Respondent-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of February in the year of our Lord One Thousand Nine Hundred and twenty two and of the Independence of the said United States the One Hundred and forty sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

386 U. S. Supreme Court, Oct., 1921, Term.

No. 778.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby Certify that the Writings annexed to this Certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 20th day of April in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the said United States the One Hundred and Forty-sixth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

387 United States District Court, Southern District of New York.

75-223.

THOMAS DE SIMONE, Libelant,

against

Steamship MURMAGOA, Her Engines, etc.

The libelant hereby excepts to the answer of the respondent, as follows:

First. That the separate and distinct defense contained in Paragraph VI thereof is insufficient upon the face thereof, for the rea-

sons: (1) That the same is not a defense to the libel and; (2) That the jurisdictional question attempted to be raised has been waived by the respondent's appearance and answer to the libel.

Wherefore, the libelant prays that the said defense may be stricken from the answer.

CELLER & KRAUSHAAR,
Proctors for Libelant.

Office & P. O. Address, 51 Chambers Street, Manhattan, New York City.

U. S. Dist. Court, S. D. of N. Y. Filed Jan. 25, 1921.

388 United States District Court, Southern District of New York

75-222.

THOMAS DE SIMONE, Libelant,

against

Steamship MURMAGAO, Her Engines, etc., Respondent.

SIR:

Please take notice that the undersigned will move this Court at a Stated Term thereof, to be held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 4 day of February, 1921, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order sustaining the libelant's exceptions to the answer filed herein.

Dated, New York, January 24th, 1921.

Yours, &c.,

CELLER & KRAUSHAAR,
Proctors for the Libelant.

Office & P. O. Address, 51 Chambers St., New York City.

To Frank N. Patterson, Esq., Attorney for Respondent, 39 Pine St., New York City.

U. S. Dist. Court, S. D. of N. Y. Filed Jan. 25, 1921.

889 United States District Court, Southern District of New York.

No. 288.

THOMAS DE SIMONE, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

THOMAS DE SIMONE, Libelant,

against

S. S. MURMUGAO, etc., Respondent.

Celler & Kraushaar, Esqs., for Libellant.
Meyer Kraushaar, Esq., of Counsel.
Frank M. Patterson, Esq., for Respondent.

Frank M. Patterson, Esq.,
Howard C. Lake, Esq.,
M. Mackensie, Esq.,
Of Counsel.

As a defense the respondent pleads in its answer, as follows:

"That the Steamships Cunene and Santa Antao are vessels flying the flag of Portugal and are owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the manage-
390 ment of "said vessels outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and International comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York."

Exceptions are taken to this. A motion has been made on behalf of the libellant to sustain the exceptions to such affirmative defense. The law of the United States guarantees immunity from attachment to the vessels of a sovereign. Whether the United States or a sovereign, depends not merely upon ownership, but also upon actual possession by the sovereign of the property at the time process is served. (The Davis, 77 U. S. 15; Long v. Tampico; Same v. Progresso, 16 Fed. 491; The Attualita, 238 Fed. 909, Carlo-Poma, 259 Fed. 369.)

This rule has been recognized in the Luigo (230 Fed. 493) and Johnson Lighterage Co. No. 24 (231 Fed. 365).

In the Pampa (245 Fed. 137) the vessel was held immune where she was in actual possession of the Argentine Government, although

engaged in carrying general merchandise. To the same effect see The Maipo (252 Fed. 627); The Roseric (254 Fed. 154); Montgomery v. City of Philadelphia (253 Fed. 473).

The Supreme Court recently had occasion to pass upon the case In re Muir and last week the Carlo-Poma. The rule of practice is there laid down and is, not to adopt the suggestion of the foreign ambassador but to permit the district court to pass upon the questions as presented by the suggestion of the foreign embassador and then determine the merits of the formal plea thus presented. I think that logically following this rule would require my per-
391 mitting the District Court Judge on the trial to pass upon the sufficiency of each of the pleas of the respondent as above set forth. The Portuguese government did not waive the jurisdictional question by its appearance in answer to the libel. (Kingdom of Rumania v. Guaranty Trust Co. 250 Fed. 341; Porto Rico v. Ramos, 232 U. S. 627.)

The motion to sustain the exceptions is denied.

March 16, 1921.

MANTON,
U. S. Circuit Judge.

U. S. Dist. Court S. D. of N. Y. Filed Mch. 16, 1921.

392 & 393 At a Stated Term of the United States District Court for the Southern District of New York held in the Court House, Post Office Building, Borough of Manhattan, City of New York, on the 27th day of May, 1921.

75—223.

Present: Hon. Martin T. Manton, U. S. C. J.

THOMAS DE SIMONE, Libellant,

against

Steamship MORMUGAO, Her Engines, etc., Respondent.

The libellant herein, by his Proctors, Celler and Kraushaar, having filed exceptions to the answer of the respondent herein, and the libellant having moved this Court for an Order sustaining his exceptions to the answer filed herein and said motion having come on duly to be heard before the undersigned, at a Stated Term of this Court, and on the 25th day of February, 1921, and after hearing Meyer Kraushaar, Esq., of counsel for the libellant, in support of said action, and Frank M. Patterson, of counsel for the respondent, in opposition thereto, and due deliberation having been had thereon, now on reading the libel the answer, the exceptions thereto and the notice of motion, dated the 24th day of January, 1921, and the decision of the Court dated the 16th day of March, 1921, all duly filed herein, it is

Ordered, that the motion to sustain the exceptions to aforesaid answer be, and the same hereby is in all respects denied.

MANTON,
U. S. C. J.

U. S. Dist. Court. S. D. of N. Y. May 27, 1921.

394 [Endorsed:] 75—223. 778. United States District Court, Southern District of New York. Thomas De Simone, Libelant, against Steamship Murmagoa, her engines, etc. Exception. Celler & Kraushaar, Proctors for Libelant, 51 Chambers Street, Borough of Manhattan, New York City. F. Dudley Kohler, Esq., Proctor for Respondent-Appellant.

Service of a copy of the within is hereby admitted.

Dated New York, 24 Jan. 1921.

F. M. P.,
P. for Resp.

395 [Endorsed:] File No. 28,733. Supreme Court U. S., October Term, 1921. Term No. 778. S. S. "Murmagao," her engines, etc., Appellant, vs. Thomas De Simone. Addition to record. Filed April 24, 1922.

396 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which S. S. "Murmugao," her engines, etc., is appellant, and Thomas De Simone is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
397 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STRANSBURY,
Clerk of the Supreme Court of the United States.

398 [Endorsed:] File No. 28,733. Supreme Court of the United States, No. 778, October Term, 1921. Transportes Maritimos do Estado, as Claimant etc., vs. Thomas De Simone. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1922. William Parkin, Clerk.

399 Supreme Court of the United States, October Term, 1921.

No. 778.

TRANSPORTES MARITIMOS DO ESTADO, as Claimant, etc.,

against

THOMAS DE SIMONE.

It is hereby stipulated and agreed by and between the proctors for the parties hereto that the record already certified and filed in the office of the Clerk of the United States Supreme Court in the above entitled cause be taken as the return of the Writ of Certiorari issued herein.

Dated, New York, April 10th, 1922.

F. DUDLEY KOHLER,
Proctor for Appellant.
CELLER & KRAUSHAAR,
Proctors for Appellee.

400 To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, April 22nd, 1922.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

401 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. S. S. "Murmugao," v. Thomas De Simone. Return to Certiorari.

402 [Endorsed:] File No. 28733. Supreme Court U. S. October Term, 1921. Term No. 778. Transportes Maritimos do Estado, &c., Petitioner, vs. Thomas De imone. Writ of Certiorari and return. Filed April 26, 1922.

403 United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

Statement.

Libel Dec. 1, 1920.
Answer Dec. 24, 1920.
Exceptions to Answer Jan. 24, 1921.
Decision Denying Motion to Sustain Exceptions by Judge Manton, March 16, 1921.
Notice of Settlement of Order for Preference Nov. 7, 1921.
Order Preferring Trial for Nov. 21, 1921, received Nov. 10, 1921.
Order of Substitution Nov. 12, 1921.
Trial Nov. 21, 1921.
Final Decree Nov. 22, 1921.
Notice of Appeal Nov. 26, 1921.
Bond for Costs Nov. 30, 1921.
Bond for Additional Security Dec. 5, 1921.
Assignment of Errors Dec. 5, 1921.

404 *Libel.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARTIMODOS DO ESTADO, Respondent.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel of Thomas De Simone against Transportes Martimodos Do Estado, in a cause of contract, civil and maritime, alleges as follows:

First. The libellant is a resident of the City of New York (Kings County) and State of New York and is in the business of furnishing supplies, provisions and maritime services to steamships and other vessels in the Port of New York and is engaged in the said business in the Borough of Brooklyn, City of New York.

Second. On information and belief (the above named respondent) is a corporation existing under and by virtue of the laws of the Republic of Portugal, and (is not now within this district, nor are any officers of the said corporation within this district, but the said

respondent has now or will have during the pendency of
405 process herein within this district) and the jurisdiction of this Honorable Court (certain property, to wit, the Portuguese steamship Murmugao. The libellant alleges further, on information and belief, that at all the times hereinafter mentioned, the respondent was and still is the owner of the steamship Cunene and the steamship Santo Antao).

Third. That the libellant, on or about the 27th day of August, 1920, at the request of the respondent and its agents, sold and delivered to the respondent's vessel Santo Antao, certain goods, wares and merchandise, of the agreed price and reasonable value of $7,987.18. That the said goods, wares and merchandise consisted of provisions required for the use of the said ship in its engine department, its saloon, its sea stores, and were required for port orders, and that said merchandise was necessary to enable the said ship to clear and make its voyage and discharge and load her cargo.

Fourth. That bills covering the various items of goods sold and delivered as aforesaid, amounting in all to the aforesaid total, were presented to and signed by the captain of the S. S. Santo Antao, as evidence that the aforesaid goods were sold and delivered and that the charges were correct. The said charges for services rendered and goods sold and delivered constitute a lien upon said steamship by reason of the nature of the services rendered and the goods sold and delivered by the libellant.

Fifth. That the libellant on the 1st of September, 1920,
406 at the request of the respondent and its agents sold and delivered to the respondent's vessel Cunene, certain goods, wares and merchandise and furnished certain medical services which said goods, wares, and merchandise and services were required by the master of the said vessel, for use of the said ship in its laundry, sea stores, port orders, engine department, deck department, steward department and medical department, so that the said ship might clear and make her voyage and discharge and load her cargo. That the said goods, wares and merchandise and the services rendered were of the agreed price and reasonable value of $8,567.32.

Sixth. That bills covering the various items of goods sold and delivered as aforesaid and services rendered, amounting in all to the aforesaid total, were presented to and signed by the captain of the S. S. Cunene, as evidence that the aforesaid goods were sold and delivered and services rendered, and that the charges were correct. The said charges for services rendered and goods sold and delivered constitute a lien upon said steamship by reason of the nature of the services rendered and the goods sold and delivered by the libellant.

Seventh. That although payment of both of the aforesaid sums have been repeatedly demanded by the libellant and its agents, payment has at all times been refused, and that the whole of said amount is still due and owing from the respondent to the libellant.

Eighth. That all and singular the premises are true and
407 within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the respondent herein, citing it to appear and answer on oath all and singular the matters aforesaid; and providing that said respondent cannot be found within this district, then that all property, goods, rights, chattels, etc., belonging to the said respondent and within this district and the jurisdiction of this Honorable Court and particularly the steamship Murmugao, be attached to the sum of $16,554.50, the sum sued for in the libel herein, together with interest on the sum of $7,987.18 from the 27th day of August, 1920, and interest on the sum of $8,567.32, from the 1st day of September, 1920, and the costs and disbursements of the libellant herein; and that the court will order, adjudge and decree that the said respondent pay to the libellant the damages sustained by the libellant as aforesaid, together with interest and costs and disbursements of this suit; and that the court will order the property of the respondent which may be attached and this libel condemned and sold to pay the same; and that the court will grant to the libellant such other and further relief as may be just in the premises.

CELLER & KRAUSHAAR,
Proctors for Libellant.

Office and P. O. Address, 51 Chambers Street, Manhattan, New York City.

408 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Thomas De Simone, being duly sworn, says I am the libellant herein. The foregoing libel is true of my own knowlege except as to the matters therein stated to be alleged on information and belief, and as to the same, I believe it to be true.

THOMAS DE SIMONE.

Sworn to before me this 1st day of December, 1920.
[SEAL.]
ROSE SCHREIMER,
Notary Public, New York County, No. 824.

Commission expires March 30, 1922.

Answer.

To the honorable Judges of the United States District Court for the Southern District of New York, in Admiralty:

The answer of the Transportes Maritimos do Estado to the libel in an alleged cause of contract, civil and maritime, brought by

Thomas De Simone, respectfully shows to this Court and alleges on information and belief as follows:

I. Respondent denies that it has any knowledge or infor-
409 mation sufficient to form a belief as to the truth of the allegations contained in the paragraph marked "First" of the libel.

II. Respondent denies the truth of the allegations contained in the paragraph marked "Second" of the libel, except that it admits that the respondent is not within this district; that it will have, during the pendency of process herein, certain property within this district, and that it is, and for some time has been the owner of the Steamships Cunene and Santo Antao.

III. Respondent denies the truth of the allegations contained in the paragraphs marked "Third" and "Fifth" of the libel except that it admits that the libelant on or about the 27th day of August, 1920, and on or about the 1st day of September, 1920, sold and delivered to the aforesaid vessels Santo Antao and Cunene certain merchandise.

IV. Respondent denies the truth of the allegations contained in the paragraphs marked "Fourth," "Sixth" and "Eighth" of the libel.

V. Respondent denies the truth of the allegations contained in paragraph marked "Seventh" of the libel, except that it admits that payment of the sums alleged has been demanded by the libelant and that payment thereof has been refused.

VI. Further answering the libel herein, and as a separate, distinct and complete defence thereto, respondent alleges upon information and belief:

1. That the Steamships Cunene and Santa Antao are ves-
410 sels flying the flag of Portugal and are owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the managements of said vessels outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

2. Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a department of the sovereign foreign government of Portugal as aforesaid and that it cannot be sued in the Courts of the United States without its consent.

Wherefore, respondent prays that the libel herein be dismissed with costs to the respondent against the libelant and that the Court

grant to the respondent such other and further relief as the justice of the case may require.

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

411 UNITED STATES OF AMERICA,
State of New York,
Southern District of New York, ss:

Jose Rocha Prista, being duly sworn, says:

I am the acting Consul General for the Government of Portugal with an office in the City of New York in the Southern District of New York. The respondent, as I am informed and believe, is a department of the Republic of Portugal, a sovereign foreign government.

I have read the foregoing answer and know the contents thereof; that the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief as to the matters stated to be alleged upon information and belief are records at the Port of New York kept by respondent and communications received from respondent's agents.

The reason this verification is not made by the respondent is that the respondent is a department of the Republic of Portugal and is not within the jurisdiction of the United States.

JOSE ROCHA PRISTA.

Sworn to before me this 24th day of December, 1920.
EUGENE H. MURPHY,
Notary Public, New York County, No. 258.

New York County Register's No. 2325.
Commission expires March 30, 1922.

412 *Testimony.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

Before Manton, Jr.

New York, November 21, 1921—11:30 a. m.

Appearances:

Meyer Kraushaar, Esq., Attorney for the Libellant;
F. Dudley Kohler, Esq., Attorney for the Respondent.

(Opening statements by counsel.)

THOMAS DE SIMONE, called as a witness in his own behalf, was first duly sworn and testified as follows:

Direct examination.

By Mr. Kraushaar:

Q. Do you know the captain of the Cunene?
A. Yes, sir.
The Court: What is his name?
—. ——.

413 Q. I show you this paper, and ask you whether it refreshes your recollection as to his name?
A. Jara Di Cavalia.
Q. During the months of August and September, 1920, did you supply the S. S. Cunene, belonging to the Transportes Maritimos, with merchandise?
A. Yes, sir.
Q. I show you this paper and ask you whether or not you did not have some laundry supplies for the Cunene?
A. Yes, sir.
Q. What was it that you did there?
A. Laundry for the ship.
Q. How much did that amount to?
A. $21.92.
Q. Is that paper which I show you, signed by the captain of the vessel? (indicating).
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
The Court: Mark it.

The same was marked in evidence as Libellant's Exhibit No. 1 of this date.

Mr. Kohler: I object to it on the ground that it has not been proved that that is the fair and reasonable value.

The Court: Yes; but the captain has signed it, and I think that is enough.

Q. On September 1st, did you supply the ship with these stores? (indicating).

A. Yes, sir.

Q. Were you personally present at the time the stores were delivered?

A. Yes, sir.

Q. I show you this paper and ask you if the captain delivered that to you after the stores were delivered?

A. Yes, sir.

Q. Is this also part of the same paper, showing deliveries in August?

A. Yes, sir.

414 Mr. Kraushaar: I offer these in evidence.

Mr. Kohler: Same objection.

The Court: Objection overruled.

Mr. Kohler: Exception.

The Court: Mark them.

The same were marked in evidence as Libellant's Exhibits Nos. 2 and 3.

Q. On August 9th did you make these deliveries to the engine department of the S. S. Prentiss?

A. Yes, sir.

Q. Did you see these delivered to the vessel?

A. Yes, sir.

Q. Did you receive from the captain and engineer this paper signed by them?

A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.

Mr. Kohler: Objected to on the same grounds, not properly proved.

The Court: Objection overruled. Mark it.

Mr. Kohler: Exception.

The same was marked in evidence as Libellant's Exhibit No. 4 of this date.

Q. On August 28th, did you deliver merchandise to the deck department of the vessel?

A. Yes, sir.

Q. Did you see the merchandise delivered?

A. Yes, sir.

Q. Did you get this paper (indicating) from the captain of the vessel?
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Same objection, ruling and exception.
The same was marked in evidence as Libellant's Exhibit No. 5 of this date.

415 Q. On the 31st of August, did you deliver this merchandise to the vessel and did you receive this paper from the captain? (indicating).
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Mr. Kohler: Same objection.
The Court: Overruled.
Mr. Kohler: Exception.

The same was marked in evidence as Libellant's Exhibit No. 6 of this date.

The Court: When the captain received it did he check up each item?
The Witness: The purser does it.

Q. In the presence of the Captain?
A. Yes, sir, in the presence of the captain.

The Court: And the purpose of that, of the signature, is to prove——
The Witness: To prove it was O. K.
The Court: That he received those goods?
The Witness: Yes, sir.

Q. Now, Mr. De Simone, what are port orders?
A. Port orders, every day he gets an order to deliver for the next day.
Q. You mean the ship orders while she lies in port certain goods?
A. Yes, sir.
Q. The officer of the vessel places the order for the goods?
A. The man who delivers the goods naturally takes the order for the next day to deliver so-and-so.
Q. And that is the receipt signed by the officer of the vessel who receives the goods each day?
A. Yes, sir.
416 Q. The original of which they give to you?
A. Yes, sir.
Q. And the duplicate?
A. Remains on the ship.
Q. And they are put in the account by the agents?
A. They check all the bills with the receipts, and see it is same, and then they sign.
Q. Sign the one bill?

A. Yes, sir.
Q. I show you this bill and ask you whether that is the bill they received for the port orders?
A. Yes, sir; that has been checked.

The Court: That is signed by the captain of the ship?
The Witness: Yes, sir.
Mr. Kraushaar: I offer that in evidence.
Mr. Kohler: Same objection.
The Court: Overruled.
Mr. Kohler: Exception.
The same was received and marked in evidence as Libellant Exhibit No. 7 of this date.
Q. While the ship was in port did you receive a request from the officers to send a physician aboard?
A. Yes, sir.
Q. And did you receive from the captain of the ship this acknowledgment?
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Mr. Kohler: Same objection.
The Court: Overruled.
Mr. Kohler: Exception.

The same was marked in evidence as Libellant's Exhibit No. 8 of this date.

417 Q. I show you this paper with reference to the steward's department, and ask you whether or not you delivered on the 9th and 29th of August the merchandise mentioned in this bill?
A. Yes, sir.
Q. Did you personally deliver the silverware mentioned in this bill?
A. Yes, sir.
Q. What became of the original copies with respect to this and the duplicates which were signed by the captain of the vessel?
A. Messrs. Roderick & Rumsey, perhaps, has a copy of that still.
Q. Well, these papers were signed in original and duplicates?
A. Yes, sir.
Q. And copies delivered to Roderick & Rumsey?
A. Yes.
Q. Did you actually deliver, on the 9th and 29th of August, silverware to the ship of the agreed price and reasonable value of $102.10?
A. Yes, sir.
Q. And you received also a duplicate or the original copy signed by the captain?
A. Yes, sir.
Q. On each date?
A. Yes, sir.
Q. You don't know what became of the original paper?

A. Roderick & Rumsey must have it. If they haven't got it, I don't know.
Q. Is this a copy of the bill you delivered to the captain?
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Mr. Kohler: Same objection.
The Court: Overruled.
Mr. Kohler: Exception.
The same was marked in evidence as Libellant's Exhibit No. 9 of this date.

418 Q. Have you the total of these invoices?
A. Yes, sir.

The Court: What is the total?
The Witness: $8,567.32.

Q. Now, was this the fair and reasonable value of these goods?
A. At the time, yes, sir.
Q. And the prices charged were all in accordance with the market value of these goods at the time?
A. Yes, sir.

Mr. Kraushaar: That is all with respect to that.
The Court: How much is the interest on that?
Mr. Kraushaar: The interest on that is $628.74.
The Court: What is the total?
Mr. Kraushaar: There is another ship comes in that, and I have the total put all together.
The Court: All right, go ahead.

Q. Now, in August was the S. S. Santo Antao in the port of New York?
A. Yes, sir.
Q. Was that one of the vessels of the Transportes Maritimos?
A. Yes, sir.
Q. During that month did you also supply goods to that ship?
A. Yes, sir.
Q. I show you a paper and ask you whether or not you supplied the goods mentioned therein to the engine department?
A. Yes, sir.
Q. Did you personally supervise the delivery of these goods?
A. Yes, sir.
Q. And were you on the ship when they were delivered?
A. Yes, sir.
419 Q. And you received that paper (indicating) signed by the captain of the vessel?
A. Yes, sir.
Q. And also by the first engineer?
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Mr. Kohler: Same objection.

The Court: Overruled. Mark it.
Mr. Kohler: Exception.

The same was marked in evidence as Libellant's Exhibit No. 9, of this date.

Q. You sent the original and duplicate original to Roderick & Rumsey?
A. Yes, sir.
Q. And on August 27th did you supply the merchandise mentioned in this paper which I show you to the salon of the ship?
A. Yes, sir.
Q. And did you receive that paper (indicating) signed by the captain of the ship?
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Same objection, ruling and exception.

The same was marked in evidence as Libellant Exhibit No. 10 of this date.

Q. You also received at the same time duplicate original which you forwarded to Roderick & Rumsey?
A. Yes, sir.
Q. I show you this paper and ask you if you supplied the goods mentioned therein to the deck department of that ship?
A. Yes, sir.
Q. Was that signed by the captain?
A. Yes, sir.
Q. And the originals and duplicates you forwarded to Roderick & Rumsey?
A. Yes, sir.

420 Mr. Kraushaar: I offer that in evidence.

Same objection, ruling and exception.
The same was marked in evidence as Libellant's Exhibit No. 11 of this date.

Q. On the 27th of August, 1920, Mr. De Simone, did you supply the sea stores to the ship described in this paper which I show you?
A. Yes, sir.
Q. They were all under your supervision?
A. Yes, sir.
Q. Did you receive that paper signed by the captain? (indicating).
A. Yes, sir.
Q. And the two, the original and duplicate which you sent to Roderick & Rumsey?
A. Yes, sir.

Mr. Kraushaar: I offer that in evidence.
Same objection, ruling and exception.

The same was marked in evidence as Libellant's Exhibit No. 12 o this date.

Q. Did you receive certain port orders while the ship lay in port?
A. Yes, sir.
Q. And in the paper I now show you, does that represent th goods delivered on the port orders?
A. Yes, sir.
Q. What became of the original? That is a copy of the original which was signed?
A. Yes, sir.
Q. What became of them?
A. Roderick & Rumsey must have them. I got a receipt for a that was delivered at the time.
Q. You have not got the original signed by the captain of that?
A. I don't know where it can be. I suppose it must be somewhere
Q. Well, that paper refreshes your memory?
A. Yes, sir.
421 Q. As to the amount of the total of port orders that were delivered?
A. At the time, at the different dates?
Q. What was the amount?
A. Altogether $728.97, but it is different dates.
Q. Was that the fair and reasonable value of the merchandise described therein?
A. Yes, sir.
Q. These papers I show you now are the original receipts, are they not, signed by the officers of the vessel receiving those port orders?
A. Yes, sir. That is the original receipts of the steward when he received the goods on board.
Q. And they were received by you from your man, Mr. Castellano?
A. Yes, sir; my man delivered them and got the receipt back.

Mr. Kraushaar: Subject to connection, I offer these papers in evidence.
Mr. Kohler: Same objection.
The Court: Taken subject to connection.

The same were marked in evidence as Libellant's Exhibit No. 1 of this date.

Q. All these goods were supplied and papers signed by the captain?
A. Yes, sir.
Q. And they were all of the fair and reasonable value of the amounts therein specified?
A. Yes, sir.
Q. And the total of that was how much?
A. The total is $7,987.18.

Mr. Kraushaar: I have computed the interest on that to be the sum of $592.38, and the total of both these ships, principal and interest, is $17,775.62.

That is all.

422 Cross-examination.

By Mr. Kohler:

Q. Was any bonus given to any of the officers of these vessels on these bills?
A. No, sir.
Q. Any commissions or bonus in consideration of giving you this business?
A. No, sir.
Q. And you didn't allow anybody any commission on the bills?
A. No, sir.
Q. Didn't give any commissions to the captains of the vessels?
A. No, sir.
Q. Or to the chief engineer?
A. No, sir.
Q. Or to the agents?
A. No, sir.
Q. And the small bills for the early deliveries you have not with you in court here?
A. Sir?
Q. (Question repeated.)

Mr. Kraushaar: Except these. (Indicating.)

A. Well, I can say "Yes,"—Oh, no, sir; the other was not signed.
Q. Well, there are five or six small bills?
A. Yes, sir.
Q. Your business has been that of ship supplies and wholesale grocer?
A. Yes, sir.
Q. And do you include in that doctor's services?
A. Yes, that is, if they order me to send a doctor on board, I would attend to it and charge on the bill for it.
Q. Do you know what the charge of the doctor was?
A. $5 per day.
Q. A vessel?
A. Yes, sir, a vessel, to stay there on board.
Q. Do you know the doctor's name?
A. Yes, Corporal.
Q. Do you deal in sea stores as well as in groceries?
A. Yes, sir.
Q. Do you buy and sell deck supplies?
A. Yes, sir.
Q. As well as sea stores and groceries?
A. Yes, sir.
Q. That is part of your business, is it?
A. Yes, sir.
Q. Did the captains of these ships tell you who owned the vessels?
A. They didn't say who owned them, only said they came from the Transportes——

Q. He didn't tell you that the Transportes Maritimos was a corporation or a department of the government of Portugal?
A. No, sir.
Q. He didn't tell you that?
A. No, sir.
Q. Did any one ever tell you that the Transportes Maritimos was a branch of the Portuguese Government?
A. I understand it was connected with the government, but which way I don't know, couldn't say.
Q. Did you know that all these ships to which you sold supplies belonged to the Portuguese Government?
A. I don't know.
Q. You know that these ships were at one time German ships?
A. I so understand.
Q. And had been given to the Portuguese government?
A. I so understand.

Mr. Kohler: That is all.

Redirect examination.

By Mr. Kraushaar:

Q. Did you ever see any uniformed officers on these ships?
A. No, sir.
Q. Did you ever see anybody in uniform on them?
A. No, sir; never did.
Q. Did any officer of the Portuguese Government ever ap-
424 proach you with reference to these goods?
A. No, sir.
Q. Did you ever do any government business aboard these ships?
A. Never had any government transactions on board these ships.
Q. They were merchant ships?
A. Yes, sir, with captains that were on other ships previous to this Transportes Maritimos.
Q. In other words, the captains of those vessels for years had been in command of merchant ships?
A. Yes, sir.
Q. And these ships only carried cargo?
A. Yes, sir.

Mr. Kraushaar: That is all.

Recross-examination.

By Mr. Kohler:

Q. Did you know that some of the supplies that you gave to the ship were for the government?
A. Never sold any for the government, only for consumption on board the ship.
Q. All these goods were for consumption on board the ship?
A. Yes, sir.

Q. You provisioned the ship for the voyage?
A. Yes, sir.

CHARLES NEURURG, called as a witness by the libellant, was first duly sworn and testified as follows:

Direct examination.

By Mr. Kraushaar:

Q. Did you receive from Mr. De Simone the original bills with reference to the supplies for the S. S. Cunene?
A. I did.
425 Q. What was your purpose with these bills?
A. To check them up and audit them.
Q. Do you know the signatures on these papers I show you?
A. Yes. Jara De Cavallia, captain.
Q. You say you know his signature?
A. Yes, sir, in extending money, cash advanced to the captain, I saw him sign.
The Court: That is his signature there?
The Witness: Yes, sir.

Mr. Kraushaar: Will it be stipulated he would testify the same way——
The Court: It is not necessary to stipulate. Just prove the signature. Make out your prima facie case.

Q. Did you receive the original bill with reference to the supplies stated there of August 9th and 29th? Those mentioned in Libellant's Exhibit No. 8?
A. Yes, sir.
Q. What did you do with it?
A. Forwarded it to Lisbon.
Q. This paper I show you, Libellant's Exhibit No. 8, is that a true copy of the paper you sent to Lisbon.
A. Yes, sir; that is my memorandum there.
Q. Did the captain sign that original?
A. Yes, sir.
Q. And this memorandum "Copy original signed by captain in our possession" is made by you?
A. Yes, sir.
Q. I show you the various exhibits relative to the Santa Antao and ask you whether or not you know the signatures of the officials who signed those papers?
A. Yes, sir.
426 Q. What was the name of the captain of the vessel?
A. Wahnen.
Q. Did you ever see Captain Wahnen write?
A. Yes, sir.
Q. Is that his signature?
A. Yes.

Q. Look through this paper and state whether it contains his signature (examining paper)?
A. Yes, sir.

The Court: Have you identified that in the record?
Mr. Kraushaar: The exhibits referred to are Exhibits Nos. 9, 10, 11 and 12.

Q. Now, with reference to Exhibit No. 13, copy of the bill for port orders, did you see the original of that bill?
A. Yes, sir.
Q. What became of that bill?
A. It was forwarded to Lisbon.
Q. The one that the captain signed?
A. Yes, sir.

Mr. Kraushaar: That is all.

Cross-examination.

By Mr. Kohler:

Q. Did Roderick & Rumsey receive any commissions on any of these bills?
A. No, sir.
Q. Do you know if these vessels were owned by the Portuguese Government?
A. Why, all I understand was through the firm, that it was a separate corporation, operated by the plan of the Shipping Board in this country.
Q. The American Shipping Board?
A. Yes, sir. I got that information from the firm. That is all I can say with reference to that.
Q. You don't know anything about this commissioner in
427 Portugal with whom you were corresponding?
A. No, sir.
Q. You don't know whether he was an employe of the government of Portugal?
A. I do not, no sir. I wish to correct his name—it is Alvaro Augustine Nunos Robeiro.

Mr. Kohler: That is all.

ALPHONSO CASTELLANO, called as a witness by the Libellant, was first duly sworn and testified as follows:

Direct examination.

By Mr. Kraushaar:

Q. What is your business?
A. Driver.
Q. Did you work for Thomas De Simone in August and September, 1920?

A. Yes, sir.
Q. Did you make personal deliveries of goods to the S. S. Santa Antao, Mormugao and Cunene?
A. Yes, sir.
Q. Did Mr. De Simone go with you when these shipments were made?
A. Lots of times.
Q. I show you these receipts and orders. Did you receive those papers from the officers of the vessels?
A. Yes, sir, from the steward.
Q. Look at every one of those, please.
A. Yes, sir (examining papers).

The Court: What exhibits are you showing him?
Mr. Kraushaar: That is part of the exhibit that is not in evidence yet.

Q. The steward signed these papers?
A. Yes, sir.
428 Q. Did you give the steward a copy?
A. Made one for him and one I bring back.
Q. Gave him a copy and the original you brought back with you?
A. Yes, sir.

Mr. Kraushaar: I offer these in evidence as one exhibit, five papers, five receipts.
Same objection, ruling and exception.

The same were marked in evidence as Libellant's Exhibit No. 14 of this date.

Mr. Kraushaar: That is all. That is the libellant's case.
Mr. Kohler: I move the court to dismiss both the libels——
The Court: Do you want to offer any proof? Usually that motion is made after the offer of the proof.
Mr. Kohler: Well, I have proof to offer, yes, sir.
The Court: What proof do you wish to offer?
Mr. Kohler: The Consul General of Portugal to prove that both these vessels were owned by the Portuguese Government and operated by them, and that they were on government business at the time they were in this port, and that these goods went really to the government and not to the ships, and therefore that the claim should be made to the government rather than against the vessels themselves.
The Court: Have you any other proof to offer outside of that? You don't question the delivery of the goods or the reasonableness of the price, do you?
429 Mr. Kohler: No, I have no proof to offer opposed to the proof as to the reasonableness of the price.
The Court: Or the delivery?
Mr. Kohler: No.
The Court: You rest solely on this special defence which is stated in the answer?
Mr. Kohler: Yes, sir.

The Court: On the ground that these were sovereign owned ships?
Mr. Kohler: Yes, sir.
The Court: And therefore cannot be liable to suit in this court?
Mr. Kohler: Yes, sir.
The Court: Have you a general appearance?
Mr. Kraushaar: Yes, sir, the vessels appeared and they filed a bond and were released.
The Court: They had some general appearance?
Mr. Kraushaar: Yes, sir, on file in this court.
The Court: As to the case in personam against the corporation, I think you have sufficiently proved that it was not a government owned corporation, but that they were privately operated ships. I do not see how you can dispute that.
Mr. Kohler: But the Consul General will testify that the Transportes Maritimos is a branch of the Portuguese Government, and it is unincorporated. It is headed by this Commissioner Ribeiro, who is an officer of——
430 The Court: He is in Washington, your Consul General?
Mr. Kohler: No, he is in New York City and he said——
The Court: Why can't he give his testimony by deposition?
Mr. Kohler: He said he would testify in his Consulate, according to his privilege. If counsel will agree to go there he will testify today.
Mr. Kraushaar: There is no such privilege——
The Court: You have no objection to taking his testimony?
Mr. Kraushaar: No, of course not, but I want to call your attention to this proposition, that on this question as to whether or not they can now show that it is a corporation or not a corporation, I think it is put to rest by this case which I have here in the United States Circuit Court of Appeals.

(Reading same.)

Mr. Kohler: The action in personam I think should fall.
The Court: Why?
Mr. Kohler: On the ground that it is not an entity at all; it is merely a branch of the government.
The Court: Not at all. It is admitted that it is a corporation organized under the laws of Portugal. The answer admits that.
Mr. Kohler: I don't understand it so. I think the answer denies it.

(Authorities read by Mr. Kraushaar.)

431 The Court: I think I will give a decree for the libellant in the case of De Simone vs. S. S. Mormugao for the amount in full, with interest, amounting to $25,503.73, and I will grant a decree against the corporation for the full amount of $17,775.62. The Court finds it in that way rather than to send this matter to a commissioner to take proof as to the damage. The respondent, after having appeared and answered generally, cannot avail itself of that part of the answer which sets up the special defence of sovereignty in the ownership and operation of the vessels. We might have stricken

out that part of the answer and sent the matter to a master to ascertain the damages, but in view of the fact that the libellant has been deprived of what unquestionably is his, the full amount here awarded to him, he should not be further delayed, but is entitled to a decree. This is particularly the case in view of counsel's admission that he cannot and will not contest the delivery of the goods or the amount which is claimed to be due and owing him. Decree may be presented accordingly.

I decline to further postpone because the proof which counsel for the respondent suggests he would offer from the Portuguese Consul would not change the result, as long as I hold that the defence of sovereignty ownership is not available at this time to either of the respondents.

Mr. Kohler: Exception.

Case Closed.

432 *Final Decree.*

At a Stated Term of the District Court of the United States for the Southern District of New York held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 21st day of November, 1921.

Present: Hon. Martin T. Manton, U. S. Circuit Judge.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

This cause having been heard on the pleadings and proofs, and having been argued and submitted by the advocates for the respective parties, and due deliberation having been had, it is

Now, on motion of Celler & Kraushaar, Esqs., Proctors for Libellant,

Ordered, adjudged and decreed by this Court, that the libellant above named Thomas De Simone, do recover against the defendant Transportes Maritimos do Estado, the sum of $16,554.50, with interest on the sum of $7,987.18, from the 27th day of August,
433 1920, amounting to the sum of $592.38, and interest on the sum of $8,567.32 from the 1st day of September, 1920, amounting to the sum of $628.74, altogether aggregating the sum of $17,775.62, together with the sum of $28.80 costs as taxed, amounting in all to the sum of $17,804.42, and that said Transportes Maritimos do Estado, be condemned to pay the same, and it is further

Ordered, adjudged and decreed that unless an appeal be taken from this decree within the time limited by the rules and practice of this court, the stipulators for costs and value on the part of the defendant, do cause the engagements of their stipulations to be per-

formed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and land for the amount of their said stipulations.

Enter.

MANTON,
U. S. Circuit Judge.

434 *Notice of Appearance.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libelant,

against

S. S. "MORMUGAO," Her Engines, etc., Respondent.

SIRS:

Please take notice that the respondent above named hereby appears in the above entitled suit and that I am retained as Proctor for it herein.

Dated, December 13th, 1020.

Yours, etc.,

FRANK M. PATTERSON,
Proctor for Respondent.

Office & P. O. Address, 30 Pine Street, Borough of Manhattan, City of New York.

To Celler & Kraushaar, Esqs., Proctors for Libelant, 51 Chambers Street, New York City; Alexander Gilchrist, Clerk.

We consent to the transfer of the balance of funds deposited with the clerk, to Frank M. Patterson.

435 *Stipulation for Value.*

Entered into pursuant to the Rules and Practices of this Court.

District Court of the United States, Southern District of New York.

Whereas, a libel was filed on the 1st day of December, 1920, by Thomas de Simone, against Transportes Maritimos do Estado for the reason and causes in the said libel mentioned; and

Whereas, The issuing of process herein has been waived in consideration of the claimant of said vessel filing due claim thereto, and also stipulations for costs and value, the latter in the sum of Seventeen thousand Five hundred ($17,500.00) Dollars, the agreed value thereof, as appears from the stipulation at the foot hereof; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its surety execution for

the above agreed amount, with interest thereon from this date, may issue against their goods, chattels and lands.

Now, therefore, The condition of this stipulation is such that if the claimant herein and American Surety Company of New York, of 100 Broadway, Borough of Manhattan, in the City of New York, and by occupation a Surety Company, the stipulation undersigned, shall abide by all orders of the Court, interlocutory or final and pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest,
436 then this stipulation to be void, otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK,
By F. G. MERRILL,
Resident Vice-President.

Attest:
[L. S.] JAMES J. LUCY,
Resident Assistant Secretary.

STATE AND COUNTY OF NEW YORK, *ss:*

On this 3rd day of December, 1920, before me personally came F. G. Merrill, known to me to be the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the annexed bond of Transportes Maritimos do Estado, as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the Resident Vice-President of the American Surety Company of New York, and knows the corpporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, and as amended March 23, 1910, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Transportes Maritimos do Estado, is the corporate seal of the American Surety Company of New York, and was thereto affixed by order and authority of the Board of Trustees of said Company; and that
437 he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with James J. Lucy, and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said James J. Lucy, subscribed to said bond is in the genuine handwriting of said James J. Lucy, and was thereto subscribed by order and authority of said Board of Trustees, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of Five Million Dollars ($5,000,000.00).

F. G. MERRILL.

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of December, 1920.

[L. S.]

N. M. HESS,
Notary Public, Bronx County, No. 25.

Register No. 2244.
Certificate filed in New York County No. 256.
Register's No. 2215.
Kings County 143.
Certificate filed in Queens, Richmond, Westchester and Ulster Co.
Term expires March 30, 1923.

438 *Notice of Appeal.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

SIRS:

Please take notice that the Transportes Maritimos do Estado respondent in the above entitled action, hereby appeals to the Circuit Court of Appeals for the Second Circuit, from a final decree of this Court, filed and entered on the 22nd day of November, 1921, and from each and every part thereof.

Dated, New York, November 25th, 1921.

Yours, etc.,

F. DUDLEY KOHLER,
Proctor for Respondent.

Office & P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

To Alexander Gilchrist, Jr., Esq., Clerk of the United States District Court, Southern District of New York; Celler & Kraushaar, Esqs., Proctors for Libellant, 51 Chambers Street, New York City.

439 *Assignment of Error.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

The respondent Transportes Maritimos do Estado, appellant herein assigns errors to the findings, decision and decree of the District Court herein, in the above entitled action as follows:

1. In that it held that by appearing in this action and answering the libel, this respondent had waived its claim to immunity to the process of this Court arising out of its sovereignty.

2. In that it held that by appearing in this action and answering the libel, this respondent had waived any claim that this Court did not have jurisdiction herein over this respondent as a Sovereign Power, or over its steamship "Cunene," as being owned and operated by it as that Sovereign.

3. In that it failed to hold that the respondents as a Sovereign Power or a department of a sovereign government was im-
440 mune to the process of this Court and that it did not waive any of its rights to suit and immunity for itself or its property or any of its rights of sovereignty by its appearing herein or answering the libel or by any other act.

4. In that it failed to hold that this respondent could properly assert its rights to sovereignty and immunity for itself and its property, to the jurisdiction of this Court at any time during the pendency of this action.

5. In that it failed to hold that because the Steamship "Cunene" was represented to be public property of the Government of the Republic of Portugal, the said steamship was not subject to attachment herein and that the attachment of the said process herein should not be executed.

6. In that it failed to hold that because the steamship "Cunene" was represented to be public property of the Government of the Republic of Portugal, this Court should not and could not take jurisdiction.

7. In that it directed the entry of a final decree herein in favor of the libellant.

8. In that it failed to hold that the defense of sovereignty was a jurisdictional defense which could be asserted at any time and was not waived by a general appearance herein.

9. In that it deprived the respondent of its defense of sovereignty herein.

441 10. In that it failed to dismiss the libel against the Transportes Maritimos do Estado in this action when libellant testified that he knew at the time of selling merchandise to the respondent, that the steamship "Cunene" was the property of and operated by the Sovereign Government of the Republic of Portugal.

11. In that the Court failed to sustain the objections of the respondent at the trial.

12. In that it failed to grant the motion of the respondent to dismiss the libel at the trial.

13. In that it did not permit respondent to offer any evidence or proof as a defense that respondent was and is the sovereign government of the Republic of Portugal.

F. DUDLEY KOHLER,
Proctor for Respondent.

Office and P. O. Address, No. 25 Broadway, Borough of Manhattan, New York City.

442 *Stipulation as to Record.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties for the purposes of this appeal.

Dated, New York, Jan. 4, 1922.

CELLER & KRAUSHAAR, ESQRS.,
Proctors for Libellant-Appellee.
F. DUDLEY KOHLER,
Proctor for Respondent-Appellant.

443 *Clerk's Certificate.*

United States District Court, Southern District of New York.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of December, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEXANDER GILCHRIST, JR.,
Clerk.

444 *Notice of Motion.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libelant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

SIR:

Please take notice that upon the annexed affidavit of Meyer Kraushaar, verified the 7th day of January, 1922, and upon the printed record of this cause heretofore filed in this Court on or about the 4th day of January, 1922, we will move this Court at the Court Rooms in the United States Court and Post Office Building in the Borough of Manhattan, City of New York, on Monday, January 16, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal in this cause or affirming the decree below entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 21st day of December, 1921, upon the ground (1)
445 that this appeal is without merit as matter of law and is frivolous, and has been taken solely for the purpose of delay, and (2) the granting of costs to libelant-appellee and extra damages because of such delay, and for such other and further relief as may seem just in the premises.

Dated, New York, January 7, 1922.

Yours, etc.,

CELLER & KRAUSHAAR,
Proctors for Libelant-Appellee.

Office & P. O. Address, 51 Chambers Street, Manhattan Borough, New York City.

To F. Dudley Kohler, Esq., Proctor for Respondent-Appellant, 25 Broadway, New York City.

446 *Affidavit of Meyer Kraushaar.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

STATE OF NEW YORK,
County of New York, ss:

Meyer Kraushaar, being duly sworn, deposes and says:

1. I am a member of the firm of Celler & Kraushaar, Proctors for the libelant-appellee herein, and have had entire charge of this action since its inception.

2. This is an appeal from a final decree in admiralty entered in the office of the United States District Court for the Southern District of New York on the 21st day of November, 1921, in favor of the libelant for the sum of $17,804.42.

3. The libel was filed on or about the 1st day of December, 1920, to recover the sum of $16,554.50, for goods sold and delivered by libelant in connection with provisioning the S. S. Santa
447 Antao and S. S. Cunene. The vessel "Murmugao" was arrested, and was released from arrest on filing the usual stipulation for value (fols. 97-105). A notice of appearance was also filed in this suit by the Transportes Maritimos Do Estado. No mention was made either in the bond or the notice of appearance of any claim that the owner objected to the Court below taking jurisdiction over it and over the suit by reason of such owner being a sovereign foreign power.

4. Claimant filed its answer herein on or about the 24th day of December, 1921, and for the first time alleged as a defense that the S. S. Murmagoa was a Portuguese vessel and was owned and operated by the Transportes Maritimos Do Estado, which was alleged to be a Department of the sovereign foreign government of Portugal; that the matters alleged in the libel were laid to the management of said vessel outside the jurisdiction of the United States, settlement of which should be left to the Portuguese Consul at the Port of New York. In said alleged defense the respondent objected and protested to the assumption of jurisdiction by the District Court, and alleged that said vessel was owned and operated by the sovereign government of Portugal, and cannot be sued in the courts of the United States without its consent (fols. 21-23).

5. By a special order of the Court dated November 21, 1921, made by the Hon. Martin T. Manton, District Judge, this case was set

down specially for trial before him on the 21st day of No-
448 vember, 1921, and Judge Manton took testimony in support of the libelant's claim and ruled as follows:

"I will give a decree for libelant in the case of De Simone vs. S. S. Murmagao for the amount in full with interest amounting to $25,-003.73, and I will grant a decree against the corporation for the full amount of $17,775.62. The Court finds it rather in that way rather than send this matter to a commissioner to take testimony as to the damages. The respondent having appeared and answered generally, it cannot avail itself of that part of the answer which sets up a special defense of sovereignty in the ownership and operation of the vessel. We might have stricken out that part of the answer, and sent the matter to a Master to ascertain the damages. But in view of the fact that libelant has been deprived of what unquestionably is his, the full amount here awarded to him, he should not be further delayed but is entitled to a decree. This is particularly the case in view of counsel's admission that he cannot and will not contest the delivery of the goods or the amount which is claimed to be due and owing to him. Decree may be presented accordingly.

I decline to further postpone because the proof which counsel for the respondent suggests he would offer from the Portuguese Consul, would not change the result as long as I hold that the de-
449 fense of sovereignty ownership is not available at this time to either of the respondents."

6. The contention raised by the appellant is without merit, and it would appear the appeal is frivolous and interposed solely for the purpose of delay. In the parallel case of Tietjen & Lang Dry Dock Company vs. Sao Vicente, this Court in December, 1921, passed upon the same contentions as appellant attempts to raise on this appeal, and in that case the Court dismissed that appeal. This case is precisely similar, and the transcript of the record was filed in the office of the Clerk of this Court on January 4, 1922.

Wherefore, I respectfully ask that an order be made herein dismissing this appeal or affirming the judgment of the Court below with costs, and also for extra damages on the ground that the appeal has been interposed solely for the purpose of delay, and that the libelant may have such other and further relief as the justice of the Court may require.

MEYER KRAUSHAAR.

Sworn to before me this 7th day of January, 1922.

ETTA OLEON,
Notary Public, New York City.

Kings Co. Clk's No. 114; Kings Co. Reg. No. 8018.
N. Y. Co. Clk's No. 153; N. Y. Co. Reg. No. 8119.
Term expires March 30, 1923.

450 *Order Dismissing Appeal.*

United States Circuit Court of Appeals for the Second Circuit

THOMAS DE SIMONE, Libelant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

The usual four days' notice of settlement is hereby waived, and it is agreed that the annexed proposed order may be presented for settlement on the 16th day of January, 1922, at 11 o'clock in the forenoon of that day, to the Clerk of the United States Circuit Court of Appeals, for the Second Circuit, at his office, in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York.

Dated, New York, January 14th, 1922.

F. DUDLEY KOHLER,
Proctor for Respondent-Appellant.

451 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 16th day of January, 1922.

Present:

Hon. Henry Wade Rogers,
Hon. Julius M. Mayer,
Circuit Judges.

THOMAS DE SIMONE, Libelant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.

Libelant-Appellee having moved this Court for an order dismissing the appeal in this cause or affirming the decree entered in the Office of the Clerk of the United States District Court, for the Southern District of New York, on the 21st day of November, 1921, and granting costs to the libelant-appellee and extra damages for delay; and said motion having come on to be heard on the 13th day of January, 1922, on a notice of motion and affidavit of Meyer Kraushaar annexed thereto, verified the 7th day of January,
452 1922, with proof of service thereof upon the proctor for the claimant-appellant, and on the printed transcript of record from the District Court of the United States, for the Southern Dis-

trict of New York, heretofore filed in this Court on or about the 4th day of January, 1922, and the proctor for the appellant having stated in open Court that the same questions were involved as in the suit of Tietjen & Lang Dry Dock Company against The Steamship Sao Vicente, and having stated in open Court that the only defense involved in this appeal was the same as involved in the appeal in the said suit of Tietjen & Lang Dry Dock Company, and the Court having heard the re-argument in said suit, and having, on the 13th day of January, 1922, affirmed its decision thereon, affirming the decree of the District Court,

In consideration whereof, it is now

Ordered, adjudged and decreed, that the motion of the libelant-appellee be granted, and that the decree of the said District Court, be and the same hereby is affirmed with costs.

HENRY WADE ROGERS,
C. J.

453 *Opinion, Mayer, C. J.*

United States Circuit Court of Appeals for the Second Circuit.

THOMAS DE SIMONE, Libellant-Appellee,

v.

Steamship MURMUGAO, Her Engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

THOMAS DE SIMONE, Libellant-Appellee,

v.

TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.

Before Rogers and Mayer, Circuit Judges.

Celler & Kraushaar, proctors for De Simone, Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.
Celler & Kraushaar, proctors for De Simone, Libellant-Appellee.
F. Dudley Kohler, proctor for Transportes, Claimant-Appellant.

MAYER, *Circuit Judge:*

Motions to dismiss the appeals are granted for the reasons stated in the Sao Vicente and other cases against the same appellant filed herewith.

454 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 60 inclusive, contain a true and complete

transcript of the record and proceedings had in said Court, in the case of Thomas De Simone, Libellant-Appellee, against Transportes Maritimos Do Estado, Respondent-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23rd day of February in the year of our Lord One Thousand Nine Hundred and twenty-two and of the Independence of the said United States the One Hundred and forty-sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

455 UNITED STATES OF AMERICA,
Southern District of New York, ss:

U. S. Supreme Court, Oct., 1921, Term.

No. 779.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby Certify that the Writings annexed to this Certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 20th day of April in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the said United States the One Hundred and Forty-sixth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

456 United States District Court, Southern District of New York.

75-222.

THOMAS DE SIMONE, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

The libelant hereby excepts to the answer of Transportes Maritimos Do Estado, the respondent herein, as follows:

First. That the separate and distinct defense contained in Paragraph VI thereof is insufficient upon the face thereof, for the reasons: (1) That the same is not a defense to the libel and; (2) That the jurisdictional question attempted to be raised has been waived by the respondent's appearance and answer to the libel.

Wherefore the libelant prays that the said defense may be stricken from the answer.

CELLER & KRAUSHAAR,
Proctors for the Libelant.

Office & P. O. Address: 51 Chambers Street, Manhattan, New York City.

U. S. Dist. Court, S. D. of N. Y. Filed Jan. 25, 1921.

457 United States District Court, Southern District of New York.

75-122.

THOMAS DE SIMONE, Libellant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

SIR:

Please take notice that the undersigned will move this Court at a Stated Term thereof, to be held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 4th day of February, 1921, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order sustaining the libellant's exceptions to the answer filed herein.

Dated, New York, January 24th, 1921.

Yours &c.,

CELLER & KRAUSHAAR,
Proctors for Libellant.

Office & P. O. Address, 51 Chambers St., New York City.

To Frank M. Patterson Esq., Attorney for Respondent, 30 Pine Street, New York City.

U. S. Dist. Court, S. D. of N. Y. Filed Jan. 25, 1921.

458 APPENDIX B.

United States District Court, Southern District of New York.

No. 288.

THOMAS DE SIMONE, Libelant,

against

TRANSPORTES MARITIMOS DO ESTADO, Respondent.

THOMAS DE SIMONE, Libelant,

against

S. S. MURMUGAO, etc., Respondent.

Celler & Kraushaar, Esqs., for Libelant.
Meyer Kraushaar, Esq., of Counsel.
Frank M. Patterson, Esq., for Respondent.
Frank M. Patterson, Esq.,
Howard C. Lake, Esq.,
M. Mackenzie, Esq.,
Of Counsel.

As a defense the respondent pleads in its answer, as follows:

"That the Steamships Cunene and Santa Antao are vessels flying the flag of Portugal and are owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the management of
459 said vessels outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York."

Exceptions are taken to this. A motion has been made on behalf of the libellant to sustain the exceptions to such affirmative defense. The law of the United States guarantees immunity from attachment to the vessels of a sovereign. Whether the United States or a sovereign, depends not merely upon ownership, but also upon actual possession by the sovereign of the property at the time process is served. (The Davis, 77 U. S. 15; Long v. Tampico; Same v. Progresso, 16 Fed. 491; The Attualita, 238 Fed. 909, Carlo-Poma, 259 Fed. 369.)

This rule has been recognized in the Luigi (230 Fed. 493) and Johnson Lighterage Co. No. 24 (231 Fed. 365).

In the Pampa (245 Fed. 137) the vessel was held immune where she was in actual possession of the Argentine Government, although

engaged in carrying general merchandise. To the same effect see The Maipo (252 Fed. 627); The Roseric (254 Fed. 154); Montgomery v. City of Philadelphia (253 Fed. 473).

The Supreme Court recently had occasion to pass upon the case In re Muir and last week the Carlo-Poma. The rule of practice is there laid down and is, not to adopt the suggestion of the foreign ambassador but to permit the district court to pass upon the questions as presented by the suggestion of the foreign ambassador and then determine the merits of the formal plea thus presented. I think that logically following this rule would require my permitting the
460 District Court Judge on the trial to pass upon the sufficiency of each of the pleas of the respondent as above set forth. The Portuguese government did not waive the jurisdictional question by its appearance in answer to the libel. (Kingdom of Roumania v. Guaranty Trust Co. 250 Fed. 341; Porto Rico v. Ramos, 232 U. S. 627.)

The motion to sustain the exceptions is denied.

March 16, 1921.

MANTON,
U. S. Circuit Judge.

U. S. Dist. Court, S. D. of N. Y. Filed Mch. 16, 1922.

461 At a Stated Term of the United States District Court for the Southern District of New York Held in the Court House, Post Office Building, Borough of Manhattan, City of New York, on the 27th day of May, 1921.

Present: Hon. Martin T. Manton, U. S. C. J.

75-122.

THOMAS DE SIMONE, Libelant,

against

TRANSPORTES MARITIMES DO ESTADO, Respondent.

The libelant herein, by his Proctors, Celler and Kraushaar, having filed exceptions to the answer of the respondent herein, and the libelant having moved this Court for an Order sustaining his exceptions to the answer filed herein and said motion having come on duly to be heard before the undersigned, at a Stated Term of this Court, and on the 25th day of February, 1921, and after hearing Meyer Kraushaar, Esq., of counsel for the libelant, in support of said motion, and Frank M. Patterson, of Counsel for the respondent in opposition thereto, and due deliberation having been had thereon, now on reading the libel, the answer, the exceptions thereto and the notice of motion, dated the 24th day of January, 1921, and the decision of the Court dated the 16th day of March 1921, all duly filed herein, it is

Ordered, that the motion to sustain the exceptions, to
462 & 463 aforesaid answer be, and the same hereby is in all respects denied.

MANTON,
U. S. C. J.

U. S. Dist. Court, S. D. of N. Y. Filed May 27, 1921.

464 [Endorsed:] $3.40. 779. County Clerk's No. 75-222, Year 192-. U. S. District Court for the Southern District of New York. Thomas D. Simone, Libelant, against Transportes Maritimes do Estado, Respondent. Order. Frank M. Patterson, Attorney for —, 30 Pine Street, Borough of Manhattan, City of New York. F. Dudley Kohler, Proctor for Respondent-Appellant.

465 [Endorsed:] File No. 28,734. Supreme Court U. S. October Term, 1921. Term No. 779. Transportes Maritimos do Estado, Appellant, vs. Thomas De Simone. Addition to record. Filed April 26, 1922.

466 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Transportes Maritimos do Estado is appellant, and Thomas De Simone is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay
467 to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

468 [Endorsed:] File No. 28,734. Supreme Court of the United States, October Term, 1921. No. 779. Transportes Maritimos do Estado (in personam), vs. Thomas De Simone. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1922. William Parkin, Clerk.

469 Supreme Court of the United States, October Term, 1921.

No. 779.

TRANSPORTES MARITIMOS DO ESTADO (in Personam)

vs.

THOMAS DE SIMONE.

It is hereby stipulated and agreed by and between the proctors for the parties hereto that the record already certified and filed in the office of the Clerk of the United States Supreme Court in the above entitled cause be taken as the return to the Writ of Certiorari issued herein.

Dated, New York City, April 10th, 1922.

F. DUDLEY KOHLER,
Proctor for Appellant.
CELLER & KRAUSHAAR,
Proctor for Appellee.

470 To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York April 22nd, 1922.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court, of Appeals for the Second Circuit.

471 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Transportes Maritimos do Estado v. Thomas De Simone. Return to Certiorari.

472 [Endorsed:] File No. 28734. Supreme Court U. S. October Term, 1921. Term No. 779. Transportes Maritimos do Estado &c., Petitioner, vs. Thomas De Simone. Writ of Certiorari and return. Filed April 26, 1922.

Petition of George S. Duarte.

Supreme Court of the United States

Term 1922.

TIETJEN & LANG DRY DOCK COMPANY,
Libellant-Appellee,

against

STEAMSHIP "SAO VICENTE", her engines, boilers, etc.,
Defendant-Appellant.

THOMAS DESIMONE,
Libellant-Appellee,

against

STEAMSHIP "MORMUGAO", her engines, etc.,
Defendant-Appellant.

THOMAS DESIMONE,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

MAXWELL ROSE, doing business under the trade name of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,

against

STEAMSHIP "MORMUGAO", her engines, boilers, etc.,
Respondent-Appellant.

MAXWELL ROSE, doing business under the trade name of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of George S. Duarte respectfully shows to this Honorable Court as follows:

Petition of George S. Duarte.

1. That your petitioner is the Consul General of the Government of the Republic of Portugal, in the United States of America, duly accredited, having its consulate General in the City of New York; that the said Transportes Maritimos do Estado, the respondent above named, was at all the times mentioned in the libels in the above entitled actions and is now a Department of the Sovereign Government of said Republic of Portugal, and that the Steamships "Sao Vicente", "Mormugao", "Santo Antao" and "Cunene" and each and every one of said steamships were at all of said times and are now the public property of and operated by the said sovereign Government of the Republic of Portugal.

2. On April 14th, 1921, in the office of the Clerk of the United States District Court, for the Southern District of New York, a libel was filed by the libellant Tietjen & Lang Dry Dock Company, above named against the Steamship "Sao Vicente" in an action for materials and supplies alleged to have been furnished to said Steamship "Sao Vicente", and work, labor and services alleged to have been performed upon her between March 25th and April 14th, 1921, amounting in all to the sum of Sixty-nine thousand dollars ($69,000). Process was issued out of the said United States District Court for the Southern District of New York, and the said Steamship was seized by the Marshall of said District.

3. On the 1st day of December, 1920, a libel was filed in the office of the Clerk of said United States District Court, by the libellant, Thomas

DeSimone, above named, against the said steamship "Mormugao" in an action for merchandise alleged to have been sold and delivered and services alleged to have been rendered to said steamship "Murmugao" on or about the 19th day of August, 1920, and alleged to be of the value of $23,717.04 and on the same day a libel was also filed in said Clerk's Office by said libellant DeSimone against the said Transportes Maritimos do Estado in an action for goods, wares and merchandise, sea stores, etc., alleged to have been sold on or about August 27th, 1920, to the "Santo Antao", also owned by said Transportes Maritimos do Estado and alleged to be of the value of $7987.18; and for goods, wares and merchandise alleged to have been sold on or about September 1st, 1920, to the steamship "Cunene", also owned by said Transportes Maritimos do Estado, and alleged to be of the value of $8567.32, or in all $16,554.50. Processes were issued out of the said United States District Court in both of said actions and in both actions the said steamship "Mormugao" was seized by the Marshall of said District.

4. Also on the same day, said 1st day of December, 1920, a libel was filed in the office of the Clerk of said United States District Court by the above named libellant Maxwell Rose, doing business under the trade names of Battery Operating Company and the Whitehall Stevedoring Company, against the said Steamship "Mormugao" in an action for services alleged to have been rendered to said Steamship "Mormugao" during the period from about August 8th to September

3rd, 1920, and alleged to have been of the value of $25,794.02, and on the same day a libel was also filed in said Clerk's Office by said libellant, Maxwell Rose, against the said Transportes Maritimos do Estado in an action for services alleged to have been rendered to the Steamship "Cunene" between about July 14th and about August 31st, 1920, and alleged to have been of the value of $24,634.11. Processes were issued out of the said United States District Court in both of said actions and in both actions the said Steamship "Mormugao" was seized by the Marshall of said District.

5. The Vice Consul General of the Government of Portugal in New York City engaged an attorney who filed an appearance and a bond in each of the above entitled actions to release the said Steamships "Sao Vicente" and "Mormugao", and answers in which he denied the material allegations in the several libels and directly and expressly pleaded that the steamships involved in each action were the property of the sovereign Government of the Republic of Portugal, and that the Transportes Maritimos do Estado was a department of the said sovereign government, and in the answer in each and every one of the above cases set up the immunity of said steamship and said sovereign to the process of this Court and objected to and protested against the assumption of jurisdiction of this Court.

6. The several libellants all excepted to the answers on substantially the same grounds, to wit:

(1) that the answer did not state facts sufficient to constitute a defense to the libel; and (2) that by appearing generally in the cause and answering the libel the sovereign had waived any claim to immunity and objection to the jurisdiction of the District Court.

7. In the first above mentioned action, that of the Tietjen & Lang Dry Dock Co., libellant's exceptions to the answer were sustained and an interlocutory decree was entered in favor of the libellant on the 17th day of August, 1921, and thereafter after a reference and a report of the Special Commissioner of the District Court, a final decree was entered on the 4th day of October, 1921, in favor of the libellant, for the sum of Seventy thousand and thirty-seven and 80/100 dollars ($70,037.80) against the sued Steamship "Sao Vicente" and the Transportes Maritimos do Estado.

8. On the 14th day of October, 1921, an appeal was taken to the Circuit Court of the United States for the Second Circuit from the said interlocutory and final decrees and every part thereof, the record was duly filed and brief was prepared by the counsel for the said steamship and the said Transportes Maritimos do Estado.

9. In the two DeSimone actions, a motion to sustain the libellant's exceptions to the waivers on the above grounds was denied by Judge Manton on March 16, 1921, and a copy of this opinion is attached to this opinion and marked Appendix B. Nevertheless, the court allowed these cases to

go to trial, and the trial resulted in a final decree in each case entered on the 22nd day of November, 1921, in favor of the libellants. The decree in the action against the "Mormugao" was for $25,531.23, and that in the action against the Transportes Maritimos do Estado was for $17,804.42. On the 26th day of November, 1921, an appeal was duly taken in each of these two cases to the Circuit Court of Appeals for the Second Circuit.

10. In the two Maxwell Rose cases the libellant's exceptions to the answers were sustained and interlocutory and final decrees were entered in each case, the latter on the 17th day of November, 1921. The final decree in the action against the "Mormugao" was for $27,963.71 and that in the other action against the Transportes Maritimos do Estado was for $26,716.43. On the 26th day of November, 1921, an appeal was duly taken in each of these cases to the Circuit Court of Appeals for the Second Circuit.

11. Thereafter the libellant Tietjen & Lang Dry Dock Company, on the 14th day of December, 1921, made a motion before the said Circuit Court of Appeals to dismiss the appeal in its said action. This motion came on to be heard before said Circuit Court of Appeal on the 19th day of December, 1921, and the said Circuit Court of Appeals granted said motion and made an order on the 23rd day of December, 1921, dismissing said appeal. The said Transportes Maritimos do Estado, through the Consul General of Portugal, claimant-appellant, then peti-

tioned the said Circuit Court of Appeals for a rehearing of said motion and its said appeal upon the merits, and prayed in its petition that in case its said petition were denied, the issuance of the mandate of said Court be stayed until the petitioner should have an opportunity to present to this Court its petition for a certiorari herein, and a decision be rendered by this Court thereon.

12. In its opinion in the Tietjen & Lang Dry Dock Company case the District Court referred to its opinion in the Rose cases in which the Court had stated that there could be no question but that the appearance in the case was general. This is conceded but it is claimed that an appearance general or otherwise by a sovereign unless there be unmistakably a consent to or an invoking of the jurisdiction of the Court does not amount to a waiver of immunity. The court also in the Rose cases says that the respondent came into court to have its property released and by so doing obtained that benefit and therefore should not claim immunity. This argument is untenable. The sovereign could have had its property, the vessel, released without thus coming into Court, by the filing of a suggestion as in the *Carlo Poma* case (259 Fed., 269). It did not prejudice the libellant in any way by thus appearing and having its property released. It substituted a bond of an unquestionably good surety in place of the vessel. The libellant, therefore, could not be prejudiced by the departure of the ship, and would not be prejudiced by the *manner* of the

claimant's asserting its rights of sovereignty. The Court there also referred to the uncertain state of the law as to the status of government-owned vessels when operated for commercial purposes. It seems now to be well settled that the immunity of such government owned vessels is not affected by this circumstance. (*The Carlo Poma,* 259 Fed., 369; *The Maipo,* 252 Fed., 627; 259 Fed., 367). Finally, the Court also stated that the sovereign must insist upon its immunity at the very inception of the litigation. This, the claimant did at the inception of its defense; it was set up at once in its answer; but this expression of the Court that the sovereign is bound to insist upon its immunity at the very inception of the case is not supported by any decision of any court and is contrary to all decisions and all principles of law in any way relating to the subject. The appeal was dismissed by the Circuit Court of Appeals, with opinion as follows:

> "This motion to dismiss is granted. The sovereign immunity can be waived and has been waived in this case."

13. The petition for a rehearing was granted and a rehearing was had on January 11th, 1922. The Court then again dismissed the appeal in the Tietjen & Lang Dry Dock case and at the same time also dismissed the appeals in the other four above entitled actions and granted a stay pending the decision of this Court upon the application for a writ of certiorari, and also directed that for that purpose application should be made in all five cases by one petition, so that all might

be heard and disposed of at once. It is for this reason that this petition is drawn as above to include all five actions.

14. On December 30th, 1921, the order for a mandate was filed in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit.

15. Subsequently, and after the unanimous decision in the DeSimone case of the Appellate Division of the New York State Supreme Court in the First Department (Appendex A, hereto attached), the Circuit Court of Appeals of the Second Circuit requested delay in the presentation of this petition, as they wished to write an opinion. In the opinion which it subsequently wrote it will be seen that it did not in any way add anything new or further justify or support its decision.

16. The appeals in these cases are not taken for purpose of delay. The Portuguese Government does not intend to avoid its just obligations to citizens of the United States, but it claims that if there is any question between it and such citizens they are matters for adjudication by the Diplomatic Departments of the two Governments and it does object to the violation of its sovereignty contrary to all rules of international law and international comity.

17. The questions of law involved in this case were duly raised and argued by your petitioners in said Circuit Court of Appeals; and are substantially as follows:

Petition of George S. Duarte.

1. Can the District Court of the United States take jurisdiction of a libel against a vessel which is the public property of a foreign government even if engaged in carrying cargo?

2. Did the sovereign government of Portugal by its appearance and answer to the libel herein waive its immunity and its right to object to the jurisdiction of the District Court?

3. Can a sovereign government be subjected to the jurisdiction of the United States District Court even in so far as to enforce against it a waiver of its immunity based upon some rule of pelading without its consent to said waiver or to said jurisdiction?

4. Can a sovereign government be subjected to the jurisdiction of the United States District Court without its consent?

5. Can the consent of a sovereign to waive its immunity be implied or inferred when it directly asserts that immunity and objects to the jurisdiction of the Court on that ground in its answer after an appearance or in any other lawful manner?

6. Since jurisdiction over a sovereign depends upon the consent of the sovereign and it can, according to the decisions of this Court in *South and North Alabama Railroad Co.* v. *Alabama,* 101 U. S., 832, and *Beers* vs. *Alexander,* 61 U. S. (20 How.) 527, withdraw that consent, can an implied

waiver of immunity or objection to jurisdiction without its consent be enforced against it?

7. Can there in fact be a waiver of immunity or objection to jurisdiction by a sovereign by implication where it never intended to waive or consented to such waiver?

8. Can there in fact be an implied waiver of immunity or objection to jurisdiction by a sovereign; must there not be an express voluntary intentional consent on the part of the sovereign to confer jurisdiction on the Court?

9. Is an objection to the jurisdiction of the subject matter of an action waived by an appearance?

10. Cannot an objection to jurisdiction of the Court herein of the subject matter of the action be raised at any stage of the action?

And your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons, among others:

1. Because an important question of international law and comity is involved.

2. Because an important question of the jurisdiction of the Courts is involved.

3. Because the public and international interests of jurisprudence require the decision of this Court upon the questions of law involved herein.

4. Because the cardinal question of waiver herein has not been directly passed upon by this Court.

5. Because there are cases now pending involving large sums all of which will be affected by the decision of this appeal.

6. Because there is evident uncertainty in the minds of the Circuit Court of Appeals, which dismissed this appeal, in that one of the judges thereof in a similar case, DeSimone vs. Transportes Maritimos do Estado, in March 16, 1921, denied a motion to sustain exceptions to the answer on the ground of a waiver of sovereignty, saying, in his opinion, "The Portuguese Government does not waive the jurisdictional question by its appearance in answer to the libel", and nevertheless appeared to entertain jurisdiction as the Court did not dismiss the libel. (See Appendix B hereto attached.)

7. Because there is a distinct conflict in the decisions of the Courts and a consequent uncertainty of the law which should be definitely removed.

While the DeSimone cases above mentioned were pending in the District Court of this District, the libellants in that case began an action *upon precisely the same cause* in the Supreme

Court of this State. The defendant, this appellant, appeared and answered as in the same case in the District Court, and denied the material allegations of the complaint and then set up the defense of sovereignty. To this defense the plaintiff demurred and the demurrer was sustained, but on appeal the Appellate Division unanimously sustained the defense of sovereignty, holding that the sovereign did not waive this defense or its immunity by a general appearance and answer as in the cases at bar and rendered an opinion in complete support of your petitioner's contentions in these cases. (See Appendix A, attached, where this opinion is set forth in full.)

8. Because the decision of the United States District Court as it now stands is and permits a distinct violation of the sovereignty of a sovereign government with which the United States is at peace.

9. Because the questions at issue are not within the jurisdiction of the Courts, and are "not judiciable but diplomatic" exclusively.

10. Because the decisions of the District Court and the Circuit Court of Appeals in these cases is in absolute conflict with all principles as laid down in the decisions of the United States Supreme Court. There have been no decisions which have held that by appearing and answering in an action in which the effort was made to bring it into court originally as a party, the sovereign waived

its claim of immunity as a sovereign. The few cases which seem to uptold this theory of waiver are cases in which the sovereign after the inception of the suit intervened and expressly asked to be permitted to come into the suit as a party. The law has been consistently against this theory of waiver by a sovereign as asserted in this case.

Kingdom of Roumania vs. *Guaranty Trust Co.*, 250 Fed., 341;
The "Luigi", 230 Fed., 493;
Porto Rico vs. *Ramos*, 232, U. S., 627;
Porto Rico vs. *Rosaly*, 227 U. S. 270;
Kawananakoa vs. *Polyblank*, 205 U. S., 349;
Smith vs. *Reeves*, 178 U. S., 436;
United States vs. *Hon. J. Whittaker Thompson et al* decided in U. S. Supreme Court, Jan. 3, 1922.

In the *Kingdom of Roumania* vs. *Guaranty Trust Co., supra*, the sovereign itself instituted an action in the District Court for the Southern District of New York to recover the balance of a deposit alleged to have been made by it. One Morris Arditte, alleged a claim against the Kingdom of Roumania for breach of the contract. The District Court made an order, on the theory that by bringing the action against the Trust Company the sovereign had waived its immunity, substituting this claimant Arditte as defendant. On appeal the Circuit Court held that even by coming into our court in this matter the sover-

eign did not waive its immunity and reversed the order. In this case, Ward, C. J., said:

> "It is the long accepted law that a foreign sovereign cannot be sued nor his property attached in the courts of a foreign friendly country without his consent. Nor can the defendant when sued by a foreign sovereign avail himself of any counterclaim or set off except perhaps a set off arising out of the same transaction. Under no circumstances can he obtain an affirmative judgment."

In this case it was held that even by directly invoking the jurisdiction of our courts, the sovereign did not waive its immunity from their jurisdiction to the extent of subjecting itself to the possibility of an affirmative judgment against it. How, therefore, can it possibly be claimed that by pleading to a libel against it and thereby directly asserting and claiming its immunity, it waived its immunity?

In *Kawanankao* v. *Polyblank*, 205 U. S., 349, Justice Holmes said:

> "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (*Leviathan*, C. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory but on the logical and practical ground that there can be no legal

right as against the authority that makes the law on which the right depends."

In *Porto Rico* v. *Ramos,* 232 U. S., 627, the Attorney General of Porto Rico asked leave to intervene and be made a party defendant. The court granted the motion. The people of Porto Rico *demurred* to the amended complaint on the ground that being a sovereign it was immune from suit at the instance of private individuals and the court held that if the suit had been originally against the people of Porto Rico it could have relied upon this immunity under *Porto Rico* v. *Rosaly,* 227 U. S., 270.

In the *"Luigi"*, 230 Fed., 493, there was a claim of owner and a bond filed and the Court allowed the attachment to stand, not on the ground of a waiver of objection to jurisdiction but only on the ground that private owners had intervened, and that therefore, the rights of the foreign sovereign, which did not own, but only held the ship under requisition or charter, could no longer be affected.

In *Smith* v. *Reeves,* 178 U. S., 436, the action was brought in the Circuit Court of the United States for the Northern District of California against the defendant as Treasurer of the State of California to recover a sum paid as taxes illegally assessed and collected, under Section 3669 of the Political Code of California. This section provided that an action might be in such cases brought against the State Teasurer, and that at the time when the State Treasurer demurs or answers he may demand that the action be tried *in the Superior Court of the County of Sacra-*

mento. The State Treasurer, represented by the Attorney General of the State demurred to the Complaint *upon various grounds affecting the merits of the case, and also moved to dismiss the case upon the ground that the Circuit Court had no jurisdiction of the defendant or of the action.*

The demurrer in the Circuit Court was on the grounds: First, that the court had no jurisdiction of the subject matter of the action, and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer on the first ground and dismissed the bill. On the appeal to the Circuit Court of Appeals, the latter court affirmed the order of dismissal, not upon the second ground but upon the ground that the Circuit Court had no jurisdiction because the State of California, a sovereign, had not consented to be sued in that court, and the case went to the Supreme Court, where the decision of the Circuit Court of Appeals was affirmed: There Justice Harlan said:

> "The suability of a state *without its consent* is a thing unknown to the law. This has been so often laid down and acknowledged by courts and juries that it is hardly necessary to be formally asserted. It may be accepted as a point of departure unquestioned. * * * The Circuit Court entertained jurisdiction of the cause and dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction, but affirmed the order of dismissal on the ground of want of jurisdiction in the latter Court to

take cognizance of such a case as here presented. We approve the action of the Circuit Court of Appeals and its judgment is affirmed."

Here althougth the sovereign had appeared and pleaded to the merits as well as the lack of juisdiction, as in the case at bar, the United States Supreme Court dismissed the bill on the ground of the immunity of the sovereign from the juisrdiction of the court.

It is clear therefore, that according to all principles of law, and also the decisions of the Court, there can be no such thing as an implied waiver by a sovereign of its immunity to the jurisdiction of our courts. There must be an unmistakable consent of the sovereign to give jurisdiction to our courts. Such consent can only be inferred from some affirmative act, in fact, directly invoking the jurisdiction such as by bringing a suit on its own initiative in such court or asking leave to be a party to a suit pending therein. No such consent can possibly be inferred where it is, as in this case, expressly denied and the claim to immunity is explicitly insisted upon in its answer. To claim that merely by answering the libel, regardless of the contents of that answer it waives its immunity is an unwarrantable and indefensible stretching of the idea of waiver or consent and also an exerting in the first instance of a jurisdiction of our court, which it could not in law or principle claim, to compel the sovereign to an unwilling consent to its jurisdiction. Such an enforced consent it is

clear is no consent, and therefore cannot properly be regarded as a waiver by the sovereign of its right to immunity. It would amount as Judge Hough said in the "*The Maipo*" (259 Fed., 367), "to what might become under conceivable circumstances, a *casus belli*", and since the sovereign power of a nation alone is competent to avenge the wrongs committed by the sovereign, a question of this character is not justiciable but is solely for the Diplomatic Departments of the several foreign governments, it seems idle to endeavor to confer jurisdiction in our courts by the fiction of an implied waiver of immunity, as in the case at bar.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals, for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

GEORGE S. DUARTE.
Consul General of Portugal in New York.

F. DUDLEY KOHLER,
Petitioner's Proctor,
Office & Post Office Address,
25 Broadway,
Borough of Manhattan,
New York City.

Petition of George S. Duarte.

State of New York, }
County of New York, } ss.:

GEORGE S. DUARTE, being duly sworn, deposes and says, that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein are true as he verily believes.

GEORGE S. DUARTE.

Sworn to before me, this
23rd day of February, 1922.

MAMIE SCHOURECK,
Notary Public, New York County.
New York Co. Clerk No. 490. Reg. No. 2459.
Certificate filed in Kings County.
Clerk's No. 238, Register's No. 2246.
Commission expires March 30, 1922.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and is entitled to the favorable consideration of the court.

F. DUDLEY KOHLER,
Proctor for Petitioner.

Appendix A.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

December, 1921.

JOHN PROCTOR CLARK, P. J.
WALTER LLOYD SMITH,
ALFRED R. PAGE,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

THOMAS DESIMONE,
Respondent,

against

TRANSPORTES MARITIMOS EO
Appellant.

No. 7181.

Appeal from an order of the Supreme Court, New York County, sustaining a demurrer to each of the several affirmative defenses contained in the answer.

Frank Patterson, of counsel (Howard S. Lake with him on the brief); for Appellant.

Meyer Kraushaar, of counsel (Emanuel Celler with him on the brief; Celler & Kranshaar, attorneys) for Respondent.

Appendix A.

PAGE, J.:

The complaint alleges three causes of action to recover for goods sold and delivered. The answer denies the material allegations of the complaint and sets up as a defense to the first cause of action that at the time of the commencement of this action there was an action in admiralty pending in the United States District Court for the Southern District of New York, in which the steamship Murmugoa, owned and operated by this defendant, was libelled by the plaintiff for the same cause of action. As a defense to the second and third causes of action, it is alleged that an action in personam in admiralty is pending in the said United States District Court for the same causes of action.

These defenses are insufficient. The action set forth in the first defense is *in rem* in admiralty, to enforce a maritime lien on the vessel, for supplies furnished, and is not the same cause of action as that set forth as the first cause of action in the complaint herein, which is an action in personam to recover for goods sold and delivered. The action set forth in the second defense is in personam, but is not exclusively of admiralty jurisdiction.

As there is a common law remedy for that cause of action, it may be prosecuted in the State courts. (*Kennedy* vs. *Cunard S. S. Co.*, 197 App. Div., 459, 466.) It is well settled that pendency of another action for the same cause in the United States Courts is not available as a defense in the State Courts, or vice versa. (*The*

Oneida County Bank v. *Bonney,* 101 N. Y., 173; *Gordon* v. *Gilfoil,* 99 U. S., 168.)

The third defense set up as against all three causes of action is a plea to the jurisdiction of the Court. It is alleged that the steamships, Murmagoa, Santo Antao and Cunene, are Portuguese vessels flying the flag of Portugal, owned and operated by the defendant, and engaged in the public service of Portugal; that the defendant is and at all times mentioned in the complaint was a department of the foreign sovereign government of Portugal, a government allied with the United States in the late World War, and now at peace with the United States; and the matters set forth in the complaint relate to the management of said vessels outside the jusisdiction of the United States, and that in accordance with the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York. The defendant objects to and protests against the assumption of jurisdiction by this court, and alleges that it is a department of a sovereign foreign government of Portugal and cannot be sued in any of the courts of the United States without its consent, and that this action is in substance and effect an action against the government of Portugal, and as such is not maintainable aganst the defendant. The answer is verified by the Vice Consul General of Portugal.

The plaintiff claims that by interposing an answer pleading to the merits, and not appearing specially, the defendant has submitted to

the jurisdiction of the court and thereby waived the plea to the jurisdiction.

A voluntary general appearance of the defendant is equivalent to the personal service of the summons within the State (Code Civ. Pro. Sec. 424), and therefore waives the objection to jurisdiction of the court in such cases as these in which the Court would acquire jurisdiction of the person if such service was made within the State.

In the case under consideration, if the defendant is a department of the government of Portugal, and we must so consider it as the demurrer admits the facts, then the Courts of this State could not obtain jurisdiction by the personal service of a summons upon anyone within the State. An ambassador or consul of a foreign government, in his official capacity, is immune from the service of process of our Courts. Even If the executive head of the government of Portugal were within the state, service on him would not give the Court jurisdiction. "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent or permission." (*Beers* v. *Arkansas*, 20 How. U. S. 527, 529; *Nichols* v. *U. S.*, 7 Wall. 122, 126.) "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or embassador of any other state, or

over the public property of any state which is destined to public use * * * To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests." (The Parlement Belge, 5 L. R. Prob. Div., 197, 214, 217.)

The plaintiff contends that by appearing and answering to the merits the foreign sovereign has evidenced its consent that these issues be litigated in this court. Of course, the sovereign can consent that any judicial question can be determined by any court. But such consent is entirely voluntary, and it may withdraw its consent at any time. (*Beers* v. *Arkansas, supra.*) If the defendant had answered by merely denying the allegations of the complaint, then there would have been force in the plaintiff's contention; but in the answer the defense of want of jurisdiction and a protest against its exercise is embodied. Under the Code pleading, the defendant may make a general or specific denial of the material allegations of the complaint, and set forth any new matter constituting as many defenses as he has (Code Civ. Pro. Sections 500, 507), and my presenting the defenses by way of answer the defendant was in no manner, either expressly or by implication, required to abandon the facts relied upon to show that the Court did not have jurisdiction over it (*Sweet* v. *Tuttle,* 14 N. Y., 465; *Hamburger* v. *Baker* 35 Hun. 455, 457). The complaint did not disclose that the action was against a

foreign government. It was, therefore, proper to set forth that fact by way of defense.

There are several ways in which the foreign sovereignty can raise the objection to being sued. The government might have appeared and raised its jurisdictional claim; or its accredited representative might have appeared and taken the same steps, as would appear to have been done in this case, the answer being verified by its Vice Consul General; or, if there was objection to appearing as a suitor in a foreign court, that government could present through the usual diplomatic channels, the asserted public status of the defendant and the vessels, and if the claim was recognized by the executive department of this government, it might be set forth in an appropriate suggestion to the court by the Attorney General of the United States or by some law officer acting under his direction (*Ex parte Muir*, 254 U. S., 522, 532). However, the objection may be presented by the foreign sovereign, the Court must give heed to it. The Court at Special Term erred in sustaining the demurrer to the third separate defense. The order will, therefore, be modified to read as follows: "that the demurrer to the first and second separate defense contained in the answer be sustained, and the demurrer to the third separate defense contained in the answer be overruled, without costs to either party as against the other," and as modified affirmed without costs.

All concur.

Appendix B.

(Decision Denying Motion to Sustain Exceptions).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS DE SIMONE,
Libelant,

against

TRANSPORTES MARITIMOS
DO ESTADO,
Respondent.

No. 288.

THOMAS DE SIMONE,
Libelant,

against

S. S. MURMUGAO, etc.,
Respondents.

Celler & Kraushaar, Esqs., for Libelant,

Meyer Kraushaar, Esq., of Counsel.

Frank M. Patterson, Esq., for Respondent,

Frank M. Patterson, Esq., Howard C. Lake, Esq., M. Mackenzie, Esq., of Counsel.

Appendix B.

As a defense the respondent pleads in its answer, as follows:

> "That the Steamships Cunene and Santa Antao are vessels flying the flag of Portugal and are owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the management of said vessels outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York."

Exceptions are taken to this. A motion has been made on behalf of the libellant to sustain the exceptions to such affirmative defense. The law of the United States gurantees immunity from attachment to the vessels of a sovereign. Whether the United States or a sovereign, depends not merely upon ownership, but also upon actual possession by the sovereign of the property at the time process is served. (*The Davis*, 77 U. S., 15; *Long* v. *Tampico; Same* v. *Progresso*, 16 Fed., 491; *The Attualita*, 238 Fed., 909, *Carlo-Poma*, 259 Fed., 369.)

This rule has been recognized in the *Luigi* (230 Fed., 493, and *Johnson Lighterage Co.* No. 24 (231 Fed., 365.)

Appendix B.

In the *Pampa* (245 Fed., 137) the vessel was held immune where she was in actual possession of the Argentine Government, although engaged in carrying general merchandise. To the same effect see *The Maipo* (252 Fed. 627); *The Roseric* (254 Fed., 154); *Montgomery* v. *City of Philadelphia* (253 Fed., 473).

The Supreme Court recently had occasion to pass upon the case *In re Muir* and last week the *Carlo-Poma*. The rule of practice is there laid down and is, not to adopt the suggestion of the foreign ambassador but to permit the district court to pass upon the questions as presented by the suggestion of the foreign ambassador and then determine the merits of the formal plea thus presented. I think that logically following this rule would require my permitting the District Court Judge on the trial to pass upon the sufficiency of each of the pleas of the respondent as above set forth. The Portuguese government did not waive the jurisdictional question by its appearance in answer to the libel. (*Kingdom of Roumania* v. *Guaranty Trust Co.*, 25 Fed., 341; *Porto Rico* v. *Ramos*, 232 U. S., 627).

The motion to sustain the exceptions is denied.

March 16, 1921.

MANTON,
U. S. Circuit Judge.

SUPREME COURT OF THE
UNITED STATES,

Nos. 775, 776, 777, 778, and 779.

TIETJEN & LANG DRY DOCK COMPANY,
Libellant-Appellee,

against

Steamship "SAO VICENTE" her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade name and style of BATTERY OPERATING COMPANY, and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,

against

Steamship "MORMUGAO" her engines, etc.,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade name and style of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

THOMAS DE SIMONE,
Libellant-Appellee,

against

Steamship "MORMUGAO", her engines, etc.,
Claimant-Appellant.

THOMAS DE SIMONE,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

Brief in Opposition of Motion to Dismiss or Affirm.

Statement.

These suits are all before this Court on Writs of Certiorari to the United States Circuit Court

of Appeals for the Second Circuit granted by this court on the second day of March, 1922.

These actions were begun by the filing of libels in rem against the vessels mentioned above and in personam against the Transportes Maritimos do Estado, on the 1st of December, 1920, and the 14th of April, 1921. Processes were issued and the vessels were arrested. The Consul General engaged an attorney who filed appearances, claims of owner and bonds in the usual form in the name of the Transportes Maritimos do Estado and the vessels were released. Thereafter in due course answers were filed in each case denying the material allegations of the libels and alleging that the steamships were owned and operated by the Government of Portugal and that the Transportes Maritimos do Estado was a department of that government and emphatically setting up the immunity of that government as a soverign and objecting to the jurisdiction of the United States Courts.

Exceptions were filed to these answers in each case on the same grounds: (1) that the answers did not state facts sufficient to constitute a defense to the libels and (2) that by appearing generally and answering the libels the sovereign had waived any claim to immunity and objection to the jurisdiction of the District Court. These exceptions were sustained in the Tietjen & Lang Dry Dock Co. and the Rose cases. In the De Simone case they were overruled on the motion to sustain them, but upon the trial which followed the same judge held that the sovereign

had waived its objections to jurisdiction and refused to hear testimony upon the question of sovereignty because he held that that defense was not available.

Decrees were entered in all the five cases against the ships and the respondent aggregating in amount $168053.59. Appeals were taken from these decrees to the Circuit Court of Appeals and that court affirmed the decrees. A reargument of the appeals was had upon the application of the appellant which resulted in the same decision by the Circuit Court of Appeals. Thereupon the appellant submitted petitions to the court for a writ of certiorari to renew the decisions of the Circuit Court of Appeals and these writs were granted in each case on or about March 13, 1922.

POINT I.

The Writs of Certiorari and the Appeals herein from the Circuit Court of Appeals should not be dismissed.

The questions at issue herein are not within Section 238 of the judiciary code. The questions are not solely questions of jurisdiction as is evident by the statement in the brief of libellant Rose in this motion, page 3, that the decision of the District Court was based on their view that the general appearances, claims and bonds filed

in the cases constituted a waiver of the privilege of immunity. It is not seriously contended that if these ships were sovereign property and the Transportes Maritimos do Estado were sovereign, which are for the purposes of these actions admitted by the filing of exceptions to the answers, they would be, but for these alleged waivers, immune and without the jurisdiction of the Court. The questions at issue therefore are questions of whether or not objections of a sovereign to the jurisdiction of our Courts can be waived as claimed in these cases and of the propriety and effect of the practice and pleading adopted by the respondents. It follows, therefore, that the *Carlo Ponia* case (255 U. S. 219) and other cited upon this point are not in point.

Lau Ow Ben vs. *United States*, 144 U. S. 47, 58.

2. In the "*Carlo Ponia*" *supra*, the decision of the District Court was that the Court did not have jurisdiction and therefore was final and finally disposed of the case. The decision of the Supreme Court in affirming this decision did not confer jurisdiction where none existed. In our cases the District and Circuit Courts of Appeal have decided that jurisdiction exists because of waiver and practice and so have assumed on these grounds a jurisdiction where none really exists and by dismissing these appeals this Court would in effect confer jurisdiction on the Court, and so assumes jurisdiction over this sovereign and its property to the extent of so doing, and would

thus perpetuate a serious error. It is the function of the Court to prevent error, regardless of technical rules under which the question may have reached it, and the only way to avoid such error, as the assumption of a jurisdiction over a friendly sovereign power, which does not and cannot exist, is to direct the dismissal of these libels.

3. The decision of the District Court on the questions involved in these appeals were not final. They were here in favor of the libellants and who contended for the jurisdiction and against the respondents. They were in favor of the jurisdiction of the Court under the circumstances and not as in the *"Carlo Ponia"* case against that jurisdiction. They were therefore not, as in that case, final, and did not dispose of these cases. Consequently this respondent had no right to a direct appeal to this Court from the District Court, for in order that an appeal may be taken directly to the Supreme Court from the District Court the decision of the District Court must finally dispose of the cases.

The "Carlo Ponia", 255 U. S. 219;
Anglo American Provision Co. v. *Davis Provision Co.*, 191 U. S. 376.

Therefore these appellants had no other course but by appeals to the Circuit Court of Appeals and writs of certiorari to bring its cases to this Court.

POINT II.

The immunity of this respondent or its property from the jurisdiction of the United States Courts was not waived.

1. The answers did clearly set up the immunity of this respondent. The statement of libellant Rose in its brief that the answers did not raise this question is vain in the face of the answers. The best reply to this claim is the answers which are before the Court. That the immunity of the vessels owned and operated by the sovereign is not affected by the fact that at the time she may have carried commercial cargo or been operated as a merchant ship is settled.

The Carlos Ponia, 259 Fed. 369;
The Pampa, 245 Fed. 137;
The Maipo, 252 Fed. 627, 259 Fed. 367;
Briggs v. *The Light Ships*, 11 Allen, 157;
The Parlement Belge, L. R. 5, P. D., 197;
The Davis, 10 Wall, 15.

2. The immunity of the sovereign need not be raised by diplomatic representations but can as in these cases properly be raised by appearance and answers to the libel.

State of Rhode Island v. *State of Massachusetts*, 12 Peters, 657;
Ex parte Muir, 254 U. S. 522, 532.

The Transportes Maritimos do Estado as claimant and respondent is the party respondent to these suits. It is a part of the Portugese Government. It is therefore, for the purposes of these suits the Portugese Government as a part includes the whole. Whether the petition suggests that it was brought on behalf of the Transportes Maritomos do Estado the petition itself shows that the questions are properly before this Court is therefore evident.

3. The sovereign in these cases did not waive its objection to the immunity of our courts even by general appearances, filing bonds and answers to the libels in which it expressly set up its immunity and emphatically pleaded its objection to the jurisdiction of the District Court.

> *Carr* v. *United States*, 98 U. S. 433;
> *State of Rhode Island* v. *State of Massachusetts*, 12 Peters 657.

It is impossible to obtain jurisdiction by the service of process upon any officer or representative of the Government of Portugal who may be within the jurisdiction of the Court. It makes no difference if some of these actions are "in rem". Considering an admiralty suit as a proceeding in rem solely against the property, and not a procedure directly or indirectly impleading the owner of the property, still a court which siezes and sells one's property assumes to make the owner subject to its jurisdiction and to implead an independent sovereign in such a way is to

call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. It cannot be indirectly impleaded, any more than it could be directly impleaded. Upon this consideration a sovereign authority cannot be personally impleaded in any court. Decisions upholding these principles have never been questioned.

The Circuit Court of Appeals, on the contrary, said:

> "3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance."

As Mr. Justice Page stated in the unanimous opinion of the Appellate Division of the New York State Supreme Court in the case of *De Simone* vs. *Transportes Maritimos do Estado*, the cases relied on by the Court as establishing this principle are *Clark* vs. *Barnard* (108 U. S., 436, 447); *Gunther* vs. *Atlantic Coast Line R. R. Co.* (200 U. S., 284, 289); *Porto Rico* vs. *Ramos* (232 U. S., 627); *Richardson* vs. *Fajardo Sugar Co.* (241 U. S., 44); *Veita et al.* vs. *Fortuna Estates* (240 Fed. R., 256, 262). In every one of these cases the question arose as to the effect of a voluntary appearance in an action in the United States Courts of either one of the states

of the United States or Porto Rico, a territory of the United States. (See *Kopel* vs. *Brigham*, 211 U. S., 468, 476.)

A state of the Union is not an independent sovereignty, either in relation to foreign nations or to the other states of the United States. The Federal Government is the sole sovereignty recognized by other governments. A state has no position in international matters except as represented by the Federal government. As between themselves the states are separate entities, but they have no power to make treaties or compacts with each other, except as authorized by the Congress of the United States. Claims cannot be enforced or wrongs redressed by levying war, but an action may be maintained against the offending state in the Supreme Court of the United States (*N. H.* vs. *Louisiana*, and *N. Y.* vs. *Louisiana*, 108 U. S., 76, 90.) A state has been designated by Mr. Justice Holmes as a "quasi sovereign" and by Mr. Justice Harlan as "possessing some powers of sovereignty. (*Georgia* vs. *Tenesee Copper Co.*, 206 U. S., 230, 237, 239.)

Within its territorial limits, a state's sovereignty ends with its state boundary lines. Its relations with other states of the Union are not governed or controlled by international law or comity but by a private system of law, usually denominated a conflict of laws, regulated and controlled by the constitution and laws of the United States.

This distinction is evident when we consider that a citizen of a state cannot sue that state in any court without its consent, because as to the

citizen the state is a sovereign, but until the adoption of the eleventh amendment to the Constitution of the United States a citizen of another state could sue a state in the United States Courts (*Chisholm* vs. *Georgia,* 2 Dallas, 419, 471-2) and as demonstrated by Chief Justice Jay, there was nothing derogatory to the dignity of a state in subjecting it to suit, in a court of the United States.

The right of a court of this country to assume jurisdiction over a cause of action against a foreign sovereign nation, or to seize and impound its property cannot be reasoned from analogy to the right to so treat another state.

> *DeSimone* vs. *Transportes Maritimos do Estado,* N. Y. App. Div. Feb. 10, 1922, —Appendix A, annexed.

Even though the procedure of the respondent in these cases be regarded as a general appearance it is not a waiver as claimed by the libellants. A general appearance for respondent may be equivalent to the personal service of process summons within the jurisdiction and therefore waive the objection to the jurisdiction of the Court in cases in which the court would acquire jurisdiction of the person if such service was made within its jurisdiction. But where the person served is immune from suit in our courts so that by personal service of the process no jurisdiction could be obtained, his service of an answer in which he protests against the assumption of jurisdiction, and pleads the want of jurisdic-

tion as a defense, does not thereby waive the defense. For the plea goes not alone to jurisdiction of the person but to the subject matter of the action as well. Although the action is to recover for goods sold and delivered; it is more, it is to recover for goods sold and delivered to a foreign sovereignty of which the court does not, and cannot have jurisdiction except with its consent.

4. There can be no implied waiver of objection to jurisdiction by a sovereign. Such a waiver or submission to jurisdiction can only be by express consent of the sovereign. A government cannot be sued except by its own *expressed* permission.

> *Carr* v. *United States*, 98 U. S. 433;
> *People* v. *State of New York* v. *Dennison*, 84 N. Y. 272;
> *Valarino* v. *Thompson*, 7 N. Y. 576;
> *Hassard* v. *Mexico*, 45 A. D. 623;
> *United States* v. *Eckford*, 6 Wall 490;
> *The Exchange*, 7 Cranch 116, 147;
> *The Siren*, 7 Wall 152, 154;
> *Stanley* v. *Schwalby*, 147 U. S. 508;
> *Republic of France* v. *Pittsburg*, 184 N. Y. 281;
> *Dollar Savings Bank* v. *United States*, 19 Wall 227, 239.

It must be conceded from the answers that this consent is lacking in this case.

5. No act of an agent or representative of the sovereign as in these cases can be interpreted or

operative as such a waiver or consent. The consent must be by the sovereign itself by the act of its legislature or other equivalent sovereign act.

Valarino v. *Thompson,* 7 N. Y. 576;
United States v. *Lee,* 106 U. S. 196;
Stanley v. *Schwalby,* 147 U. S. 508;
De Simone v. *Transportes Maritimos de Estado, supra,*

In this last cited cases, Page, J., says:

"In *New Hampshire* vs. *Louisiana,* and *New York* vs. *Louisiana* (*supra*) it was distinctly held that one state cannot create a controversy with another state by assuming the prosecution of debts owing by the other state to its citizens. In *United States* vs. *Diekelman* (92 U. S., 520, 524) the Court said: "One nation treats with the citizens of another only through their government. A. sovereign cannot be sued in his own courts *without his consent.* His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in the performance of his obligations, by treaty or otherwise voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If

this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself."

6. There can be no estoppel of a sovereign to set up its immunity or objection to the jurisdiction of our courts not only for the reasons above stated, but also because even whenever the sovereign does consent to submit to jurisdiction it is its right inherent in its sovereignty to withdraw its consent.

Beers v. *Arkansas* 61 U. S. 527;
South & North Alaba... R. R. Co. v. *Alabama*, 101 U. S. 832.

POINT III.

The suits are all against the sovereign government of Portugal.

1. It is difficult to understand how Messrs. Crowell & Rouse, Counsel for the Tietjen & Lang Dry Dock Co., should assert in their brief page

13 that their suit is not against the Government of Portugal. Of course a suit against a merchant vessel is not necessarily a suit against the government whose flag it flies. This argument is most frivolous. Were it true then no ship of a private owner could be sued. All would be immune, as all vessels of private owners fly a flag of some sovereign. But the vessels in these cases were all owned and operatd by the Sovereign. None were owned by private persons, Portuguese citizens. Their immunity and that of the Transportes Maritimos do Estado does not depend upon the flags at the stern of these ships, but upon the fact that the ships were the property of the Sovereign and the Transportes Maritimos do Estado was sovereign.

2. The argument that because the bonds filed by the respondent were those on which the surety, not the principle, was a domestic private corporation the respondent is precluded from asserting its claim to assistance, on page 14 of the brief of Crowell and Rouse, on this motion is about as fallacious and idle as their flag argument above considered.

The fact that bonds were filed in these cases could not be considered a waiver of immunity or objection to jurisdiction. The process against the vessel is to compel an appearance. To seize a vessel of a sovereign and compel its master or any one else to give a bond is merely to bring the sovereign into court and to subject it in its sovereign capacity to the jurisdiction of the Court by attaching its property, in other words, if this

could be construed as a waiver, to *compel* the sovereign to waive its immunity and this would be impossible for many reasons including the fact that it would lack any *consent* of the sovereign.

If again as these gentlemen claim, this bond was the bond of the Transportes Maritimos do Estado (page 4 of their brief) then it was the bond of the Sovereign and not of a private owner as in the "Luigi" case (230 Fed., 493) cited by them and that case lends no support to their argument. In this Luigi case the vessel was owned by a private owner. It was only held by the sovereign under charter. The *private owner* intervened and filed *its* bond and released the ship. The bond of a *private owner* was substituted for the ship as the new res and thus the rights of the sovereign were not affected. It was on this ground only that the attachment of the Luigi was allowed to stand. In these cases the new "res" was the bond of the owner, the Sovereign on which the Surety Company, the domestic corporation was only the surety. It is still the property of the sovereign that is affected and in issue here.

3. In one sense the respondent by its pleadings may have submitted the questions as to whether or not it was a department of the Government of Portugal as an issue of fact, but this was admitted by the libellants by filing exceptions to the answers which operate as demurrers as to the facts alleged in the answers. *Equally* it is thus admitted that these actions are against the Government of Portugal as alleged in these answers.

POINT IV.

The Petitioner is properly before this Court.

1. The petition was filed herein by Mr. Duarte as the representative of and acting for the Transportes Maritimos do Estado and with full authority vested in him so to act. The appellant *is* the Government of Portugal. The appellant is the Transportes Maritimos do Estado and The Transportes Maritimos do Estado is a part of that Government, just as the Navy, War, or Interior are departments of our government, and therefore, the appellant is in fact the Government of Portugal.

2. The statement on page 14 of the libellant Tietjen & Langs Dry Dock Co's. brief that in the personam cases the claimant has not denied that it was a foreign corporation is sufficiently answered by referring to its answers in those cases.

3. If the petition for writs of certiorari in these cases are not those of the Transportes Maritimos do Estado, because made by its representative the Consul General of the said Government, then there were no appearances, bonds or answers filed by the owner of the vessels or the Transportes Maritimos do Estado, as these documents show

on their face that they were only sustained by a like authority, and, therefore, all that the libellants base their contentions of waiver and jurisdiction upon must fall and they are out of court.

POINT V.

The orders of the Circuit Court of Appeals should not be affirmed.

1. These appeals and writs of certiorari were not taken for delay as alleged in the briefs of Counsel on this motion but for the protection of the appellant and to vindicate and maintain its rights as a sovereign to which it is entitled at the hands of the sovereign government of this republic.

2. It is evident that the appellant's contentions are not frivolous from the wealth of decisions which it has been able to cite in support of them in this brief and in previous papers submitted to this Court and to the lower courts, and also from the fact that its contentions are fully supported in the well considered unanimous decisions of the six judges sitting in the Appellate Division of the Supreme Court of this State in this Department upon one of these identical cases.

3. The libellants have advanced on this motion in their affidavits and moving papers not one new

fact which has any bearing whatever upon the questions at issue on this appeal, namely whether or not there can be a waiver, by a sovereign of objection to the jurisdiction of our courts by a general appearance and answer, or such a waiver by implication without express consent of the sovereign, and whether the said objection can be effectively raised by an answer specially pleading it. There is nothing new in these moving papers except possibly statements concerning the financial affairs of some of the libellants, the hardships from their failure to collect in this way from this sovereign or unfounded aspersions and more or less verbal attacks on the professional standing of counsel for the appellant, all of which have no bearing upon the case, so that the decision of *Furness Withy & Co., Ltd.*, v. *Yang Tsze Insurance Association Ltd., et al,* cited in the First Point in Libellant Rose's brief has no bearing upon this case.

4. As to the matter of advancing these cases on the calendar of this Court this appellant, already offered to consent to this course, if it pleased the Court, and it is willing without opposition to leave this matter entirely to the wishes and discretion of this Court.

POINT VI.

These motions to dismiss or affirm should be denied with costs.

1. This appellant respectfully submits that all the material questions raised upon these motions were submitted to this Court upon the petition for the Writs of Certiorari and the briefs of counsel in support thereof and in opposition thereto and all these matters and the regularity and sufficiency of the papers and proceedings received the careful and full consideration of this Court when it granted the Writs of Certiorari herein. The motion papers on this motion add nothing new.

Dated, New York City, May 1st, 1922.

Respectfully submitted,

F. DUDLEY KOHLER,
Proctor for Claimant-Respondent.

APPENDIX "A".

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

February, 1922.

Present—Hon. JOHN PROCTOR CLARKE, P. J.,
" FRANK C. LAUGHLIN,
" VICTOR J. DOWLING,
" ALFRED R. PAGE,
" EDGAR S. K. MERRELL, JJ.

THOMAS DE SIMONE, Respondent, vs. TRANSPORTES MARITIMOS DO ESTADO, Appellant.	Motion No. 58, February 10, 1922.

Motion for a re-argument of the appeal decided January 13, 1922 (App. Div.,), or in the alternative for leave to appeal to the Court of Appeals.

APPEARANCES:

MEYER KRAUSHAAR, of Counsel (Celler & Kraushaar, Attorneys), for the motion.

F. DUDLEY KOHLER, opposed.

PAGE, J.:

The inspiring cause of this motion is the fact that the United States Circuit Court of Appeals for the Second Circuit, in a suit in admiralty, wherein the vessels libelled were in the possession and control of the above-named defendant, had dismissed the appeal and stated that "The sovereign immunity can be waived in this case." Thereafter our decision was called to the attention of that Court, with the suggestion that our decision was not in harmony with theirs, whereupon the Circuit Court handed down an opinion more fully stating their views, and their opinion is, among other things, suggested as grounds for a re-argument of this appeal. Our great respect for the learning and ability of the United States Circuit Court of Appeals for the Circuit of which this State is a part, has caused us to give careful consideration to their opinion, especially to the reasons assigned in the final statement denominated "3". The remaining part of the opinion dealing with the facts as related to admiralty procedure have no bearing upon a decision in an action at law in a court of the State of New York.

In our former opinion we held that the defendant by serving an answer denying certain material allegations of the complaint and pleading certain separate defense, among which was a plea to the jurisdiction on the ground that the defendant was a department of the government of Portugal, an independent sovereign nation in amity with the United States Government, did not thereby waive the objection to the jurisdiction. The

substance of the defense was thus stated in our opinion: "The defendant objects to and protests against the assumption of jurisdiction by this Court, and alleges that it is a department of the sovereign government of Portugal and cannot be used in any of the courts of the United States without its consent, and that this action is in substance and effect an action against the Government of Portugal, and as such is not maintainable against the defendant." To this defense a demurrer was interposed for insufficiency. We treated this answer as the equivalent of a voluntary general appearance and stated: "A voluntary general appearance of the defendant is equivalent to the personal service of the summons within the state (Code Civil Procedure §424) and therefore waives the objection of jurisdiction of the court in such cases as those in which the court would acquire jurisdiction of the person if such service was made within the states." We pointed out that it was impossible to obtain jurisdiction by the service of a summons upon any officer or representative of the Government of Portugal that might have been within this State.

The Circuit Court of Appeals, on the contrary, said:

> "3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance."

The cases relied on by the Court as establishing this principle are Clark vs. Barnard (108 U. S., 436, 447); Gunther vs. Atlantic Coast Line R. R. Co. (200 U. S., 284, 289); Porto Rico vs. Ramos (232 U. S., 627); Richardson vs. Fajardo Sugar Co. (241 U. S., 44); Veita et al. vs. Fortuna Estates (240 Fed. R., 256, 262). In every one of these cases the question arose as to the effect of a voluntary appearance in an action in the United States Courts of either one of the states of the United States or of Porto Rico, a territory of the United States. (See Kopel vs. Brigham, 211 U. S., 468, 476.)

A state of the Union is not an independent sovereignty, either in relation to foreign nations or to the other states of the United States. The Federal government is the sole sovereignty recognized by other governments. A state has no position in international matters except as represented by the Federal government. As between themselves the states are separate entities, but they have no power to make treaties or compacts with each other, except as authorized by the Congress of the United States. Claims cannot be enforced or wrongs redressed by levying war, but an action may be maintained against the offending state in the Supreme Court of the United States (N. H. vs. Louisiana, and N. Y. vs. Louisiana, 108 U. S., 76, 90.) A state has been designated by Mr. Justice Holmes as a "quasi sovereign" and by Mr. Justice Harlan as "possessing some powers of sovereignty". (Georgia vs. Tennessee Copper Co., 206 U. S., 230, 237, 239.)

Within its territorial limits, a state may take and enforce laws; set up courts and define their jurisdiction; maintain a militia; exercise the police powers and rights of eminent domain; levy and collect taxes; create municipal and private corporations; and exercise generally sovereign powers. Its sovereignty ends with its state boundary lines. Its relations with other states of the Union are not governed or controlled by international law or comity, but by a private international law, usually denominated a conflict of laws, regulated and controlled by the constitution and laws of the United States. This distinction is evident when we consider that a citizen of a state cannot sue that state in any court without its consent, because as to the citizen the state is a sovereign, but until the adoption of the eleventh amendment to the Constitution of the United States a citizen of another state could sue a state in the United States Courts (Chisholm vs. Georgia, 2 Dallas, 419, 471-2) and as demonstrated by Chief Justice Jay, there was nothing derogatory to the dignity of a state in subjecting it to suit, in a court of the United States.

It has been the practice of states either to erect special courts in which one of its citizens could prosecute claims against the state, or to confer jurisdiction on courts to hear and adjudicate such claims. Therefore its consent to waive the constitutional immunity from suit could be implied from its act by appearance as well as by express legislative provision.

In my opinion the right of a court of this country to assume jurisdiction over a cause of action

against a foreign sovereign nation, or to seize and impound its property cannot be reasoned from analogy to the right to so treat another state. In New Hampshire vs. Louisiana, and New York vs. Louisiana (supra) it was distinctly held that one state cannot create a controversy with another state by assuming the prosecution of debts owing by the other state to its citizens. In United States vs. Diekelman (92 U. S., 520, 524) the Court said: "One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in the performance of his obligations, by treaty or otherwise voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibilty of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." Alexander Hamilton wrote, "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This

is the general sense, and the general practice of all mankind." (The Federalist No. LXXXI.) The leading case in this country on the immunity of a vessel of a foreign sovereignty from seizure, by the courts of the United States in a suit in admiralty is The Exchange (7 Cranch, 116) in which the schooner Exchange, owned by American citizens was seized on the high seas by a French privateer, taken to France and refitted as a vessel of war. Two years after she entered an American port, and upon libel filed in the United States District Court, by her former owners, was seized by process of the court. The libel was dismissed by the District Court, the sentence of the District Court reversed by the Circuit Court and on appeal the sentance of the Circuit Court reversed and that the District Court affirmed by the Supreme Court of the United States. Mr. Justice Marshall writing for the Court held that a public armed vessel of a foreign nation entering the port of a friendly state under the circumstances of that case is not subject to the judicial tribunals of the United States. The same principle was applied by the Court of Appeals Division of the High Court of Justice of England in the case of the Parlement Belge (L. R., 5 Prob. Div., 197 in 1880) in proceedings in rem to secure redress for loss incurred by a collision instituted against an unarmed mail packet boat belonging to the Government of Belgium, officered and commissioned by that Government and sailing between Dover and Ostend. The court held that the vessel came within the rule which extends immunity from the

jurisdiction of the courts of one country to the public vessels of a foreign nation, even though incidentally carrying freight and passengers for hire. The court cited and quoted from the following cases: The Exchange (supra); The Duke of Brunswick vs. The King of Hanover (6 Beav. ,1, 50); The Prins Frederick (2 Dod., 451, 456); De Haber vs. The Queen of Portugal (17 Q. B., 171); The Athel (1 Wm. Rob., 374); Briggs vs. The Lightships (11 Allen [Mass.] 157); The Marquis of Huntley (3 Hagg., 246); The Thomas A. Scott (10 L. J., [N. S.] 726) and Vavasseur vs. Krupp (L. R., 9 Ch. D., 351). The court then said: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." The court then considered the argument that the admiralty suit was a proceeding in rem solely against the property, and not a procedure directly or indirectly impleading the owner of the property, and held that a court which seizes and sells a man's property assumes to make that man subject to its jurisdic-

tion and said (page 219): "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court." These decisions so far as I have been able to discover have never been questioned.

Is this immunity from suit lost by appearing generally and protesting or setting up the plea of immunity by answer? As we stated in our former opinion, a voluntary general appearance of the defendant is equivalent to the personal service of the summons within the state (Code Civ. Pro. §424) and therefore waives the objection to the jurisdiction of the Court in cases in which the court would acquire jurisdiction of the person if such service was made within the state. It follows from this that where the person served is immune from suit in our courts so that by personal service of the summons no jurisdiction could be obtained, his service of an answer in which he protests against the assumption of jurisdiction, and pleads the want of jurisdiction as a defense, does not thereby waive the defense. For the plea goes not alone to jurisdiction of the person but to the subject matter of the action as well, although the action is to recover for goods sold and delivered, of which the Court would have jurisdiction

ordinarily. It is more than this, it is to recover for goods sold and delivered to a foreign sovereignty of which the court does not, and cannot hace jurisdiction except with its consent. In the case of The Parlement Belge (supra), (page 220) the Court said: "It has been frequently stated that an independent sovereign cannot be personally sued, although he carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded and in both cases because such suit would be inconsistent with the independence and equality of the state which he represents." In one sense the defendant by pleading has submitted the question as an issue of fact to the court, and that is whether the defendant above named is a department of the government of Portugal. We did not discuss this in our former opinion for there we were dealing with the demurrer to the defense which we overruled, thereby holding that the facts alleged, taken as true, would constitute a defense. We did not direct a dismissal of the complaint but left the issue of fact to be tried. The plaintiff claims that he is thus put at a disadvantage, as he will have to fully develop his case before the defendant is required to put in its defense. This result does not follow. The Court at Special Term would, undoubtedly, grant an order directing the issue of jurisdiction to be separately tried, as that issue if resolved in favor of the defendant would lead to a dismissal of the action, and if decided that the defendant was not a de-

partment of the government but a corporation similar to that considered by us in Ingersoll-Rand Co. vs. U. S. Shipping Board Emergency Fleet Corporation (195 App. Div., 838) then the action would be tried on its merits.

In Ex parte Muir (254 U. S., 522, 532) the Court indicated the different methods in which a foreign sovereignty could raise the question of jurisdiction. We stated in our former opinion the methods therein set forth, among which was by appearing in the action, or presenting its claim through the State Department of the United States Government and, if it sanctioned the claim of immunity, presenting it to the court through the Attorney General. In the Pesaro case (255 U. S., 216) instead of following the methods prescribed in Ex parte Muir the Italian Ambassador suggested to the court that the ship was owned by the Italian Government and at the time of the arrest was in its possession. The libellant objected that a direct suggestion by the Ambassador was admissible and that to be entertained, the suggestion should come through the official channels of the United States. This objection was overruled and the ship released from arrest.

The Supreme Court in reversing the decree said (page 219): "The terms and form of the suggestion show that the ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a "suggestion" and we think it was nothing more. In

these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken, (Ex parte Muir, 254 U. S. 522"); and further stated that an opportunity must be given so to present and establish the matters affirmed in the suggestion in an appropriate way when the case goes back to the District Court.

In the instant case the above named defendant by its attorney answered, setting up the defense that it was a department of the Government of Portugal. Can it be said that the defendant had consented to the jurisdiction of the court when the answer presented a protest and a defense to the jurisdiction? As the Court said in United States vs. Diekelman (supra): "It rests with the sovereign against whom the demand is made to determine what he will do with it." In the instant case a defense to the jurisdiction of the court and a protest against its exercise was submitted to the court.

If that should prove to be the fact the court has no jurisdiction and could not disregard the protest and overrule the objection by a claim that by the municipal law of this State the defense was waived, for by the law of nations an adjudication binding the sovereign to pay the judgment could not be made nor its property taken on execution to satisfy the judgment. To hold otherwise would allow the courts of this State to endanger the peaceful relations between the United States and a friendly sovereignty and furnish the latter with a *casus belli*.

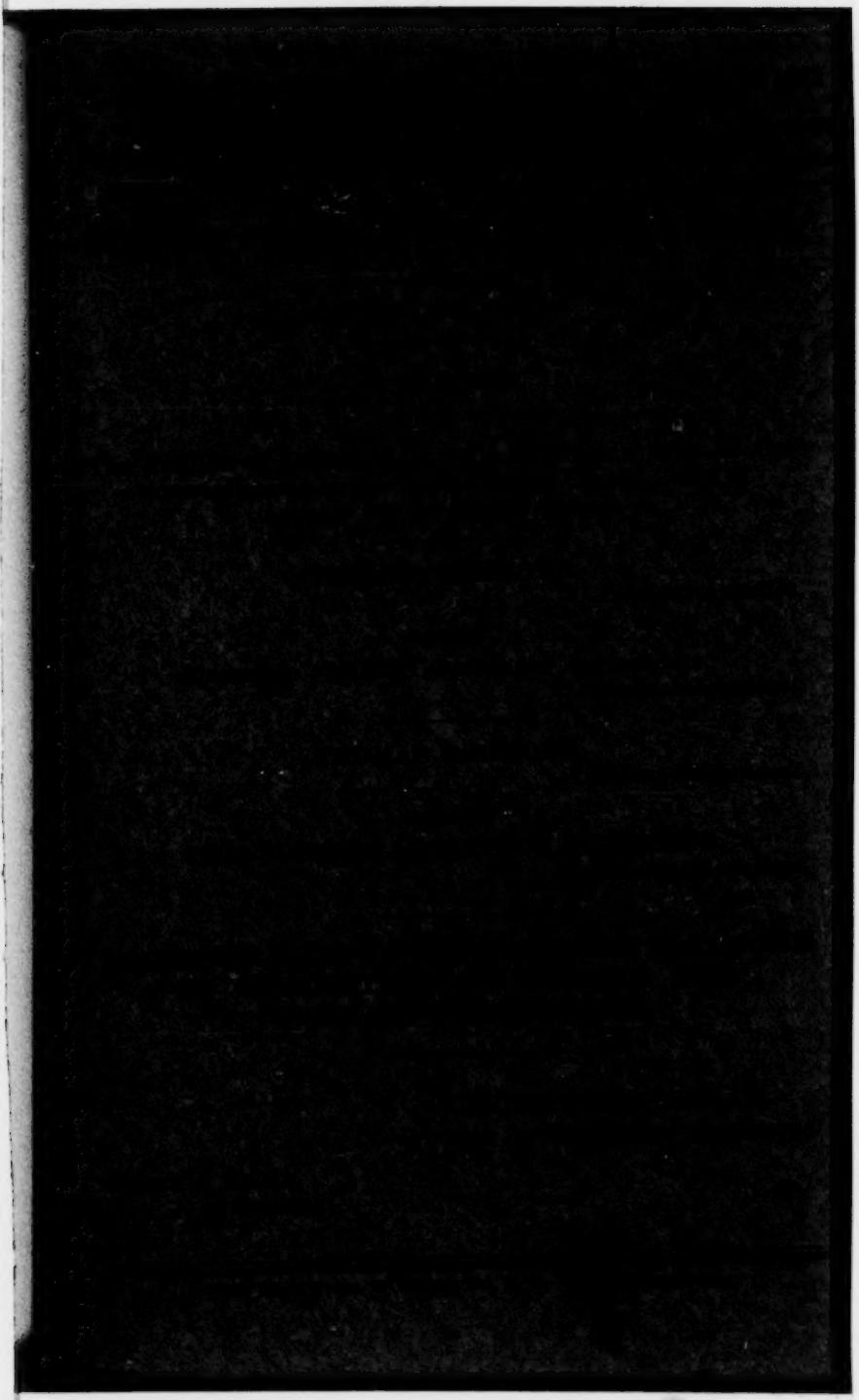
In our former opinion we cited the case of Smith vs. Tuttle (14 N. Y., 465), merely for the purpose of showing the distinction between please in common law pleading and answers and defenses under the code pleading; that under the former pleas in abatement and in bar could not be joined, while under the latter a defendant answers but once and he may set forth as many defenses as he thinks he has, and therefore a union of defenses in an answer did not necessarily cause the abandonment of any of them. As an illustration and in harmony with this principle we cited Hamburger vs. Baker (35 Hun, 455, 457). This case was not overruled in Reed vs. Chilsom (16 N. Y. Supp., 744, aff'd, 142 N. Y., 152), in which the non-resident defendant whose property had not been attached appeared by attorney who served a general notice of appearance, and some three months afterwards answers were served setting up several defenses and among them the lack of jurisdiction. In the Hamburger case and in the case at bar there was no notice of appearance served, but the appearance was effected by the service of an answer. A notice of appearance may be limited for the purpose of raising the question of the jurisdiction of the court and where the appearance is by demurrer or answer which raises the question of jurisdiction of the court the defendant cannot be held to waive the objection or defense expressly stated in the pleading. §488 of the Code of Civil Procedure expressly provides that "the defendant may demur to the complaint, where one or more of the follow-

ing objections appear upon the face of the complaint. 1. That the Court has not jurisdiction of the person of the defendant. 2. That the Court has not jurisdiction of the subject of the action'' * * * and (§498) where any matter enumerated in §488 as grounds for demurrer do not appear on the face of the complaint the objection may be taken by answer. If not taken either by demurrer or answer the defendant is deemed to have waived it except the objection to the jurisdiction of the Court. * * * (§499). If the objection in the first instance is presented in the manner prescribed by the Code, how can the defendant be deemed to have waived it? The answer would seem to be that it has not. (Popfinger vs. Yutte, 102 N. Y., 38, 42; Hankinson vs. Page, 19 Abb. N. C., 274., 276; Wallace, J., U. S. Dist. Co., So. Dist., N. Y.; Weidman vs. Libby, 16 App. Div. 616, 622.)

In the instant case if the facts stated in the defense are proved then no court in the State of New York has acquired or can acquire jurisdiction of the person or the subject matter of the action over the protest of the defendant. We therefore adhere to our original decision, and the order will be modified as directed in our former opinion.

As the order does not finally determine the action, leave to appeal to the Court of Appeals is denied with $10 costs.

ALL CONCUR.



Supreme Court of the United States

OCTOBER, 1921, TERM.

IN THE MATTER
OF
The Petition of GEORGE S. DUARTE for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Second Circuit.

THOMAS DESIMONE,
Libelant-Appellee,
against
Steamship "MURMUGAO," her engines, etc.,
Defendant-Appellant.

THOMAS DESIMONE,
Libelant-Appellee,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

BRIEF OF RESPONDENT, THOMAS DeSIMONE.

Statement.

Thomas DeSimone has instituted two suits in admiralty, one *in rem* against the steamship

"Murmugao," her engines, boilers, etc., and one *in personam* against the Transportes Maritimos Do Estado, in the District Court of the United States for the Southern District of New York, alleging in the action *in rem* that on the 19th day of August, 1920, at the request of the agents and persons in charge of the steamship "Murmugao," which was then within the aforesaid District, he sold and delivered, in reliance upon the credit of said vessel, merchandise, and furnished certain services, at the agreed price and reasonable value of $23,717.04; that the said merchandise and services were of a maritime character and were necessary to enable the ship to clear and make her voyage and to discharge and load her cargo, and, although the captain of the steamship had himself signed the bills rendered for the merchandise as evidence that the same were actually sold and delivered and that the services were actually rendered and that the charges were correct, no part of the same was paid. In the suit *in personam* the libelant alleged that the Transportes Maritimos Do Estado was a corporation organized under and by virtue of the Laws of the Republic of Portugal, and the owner of two vessels known as "Cunene" and "Santo Antao," which were then, at the time of the pendency of the process, within the Southern District of New York, and that at the request of said company and its agents it sold to the vessel "Santo Antao" merchandise of the agreed price and reasonable value of $7,987.18, and to the vessel "Cunene" merchandise of the agreed price and reasonable value of $8,567.32, all of which were of a maritime character and were necessary to enable the respective ships to clear and make their voyage

and to discharge and load her cargo, and, although the master of the respective vessels signed the bills evidencing the sale and delivery and the agreement to pay, no part of these respective sums, amounting to $16,554.50, were paid.

In both suits the Transportes Maritimos Do Estado came in and filed a general notice of appearance, by Frank M. Patterson, its proctor, and thereupon petitioned the court and secured permission to file stipulations for value, and did thereupon file a stipulation for value in each case, and the vessels were discharged from the custody of the United States Marshal. Thereupon, by Frank M. Patterson, its proctor, the Transportes Maritimos Do Estado filed answers to the respective libels, and set up by way of affirmative defense that the steamship "Cunene," steamship "Santo Antao" and steamship "Murmugao" were owned and operated by the Transportes Maritimos Do Estado, a department of the sovereign foreign Government of Portugal, for which reason it objected and protested to the assumption of jurisdiction on the ground that it could not be sued in the courts of the United States without its consent.

Exceptions were filed by the libelant to this affirmative defense on the ground that by its general appearance, and by the filing of a stipulation for value, and by securing the release of the vessels from arrest upon a general notice of appearance, the Transportes Maritimos Do Estado, whether it be a corporation or a department of the Portuguese Government, consented to the jurisdiction of the court and waived the privilege of asserting an immunity, if any existed. The exceptions were overruled by Manton, *J.*, whose opin-

ion may be found annexed to the petition for a writ of certiorari herein.

It will be observed from an examination of this decision that Judge Manton, at that time, was of the opinion that an immunity was not waived by such general appearance and, therefore, permitted the respondent to try that issue as one of fact.

The case came on for trial, and neither the sale nor delivery of the merchandise was disputed, although the answers to the libel did attempt to dispute the value of the merchandise sold and delivered and the value of the services rendered.

The following colloquy took place between court and counsel at the end of libelant's proof:

> "Mr. Kohler: I move the court to dismiss both the libels——
>
> The Court: Do you want to offer any proof? Usually that motion is made after the offer of the proof.
>
> Mr. Kohler: Well, I have proof to offer, yes, sir.
>
> The Court: What proof do you wish to offer?
>
> Mr. Kohler: The Consul General of Portugal, to prove that both these vessels were owned by the Portuguese Government and operated by them, and that they were on government business at the time they were in this port, and that these goods went really to the government and not to the ships, and, therefore, that the claim should be made to the government rather than against the vessels themselves.
>
> The Court: Have you any other proof to offer outside of that? You don't question the delivery of the goods or the reasonableness of the price, do you?
>
> Mr. Kohler: No, I have no proof to offer

opposed to the proof as to the reasonableness of the price.

The Court: Or the delivery?

Mr. Kohler: No.

The Court: You rest solely on this special defense which is stated in the answer?

Mr. Kohler: Yes, sir.

The Court: On the ground that these were sovereign owned ships?

Mr. Kohler: Yes, sir.

The Court: And, therefore, cannot be liable to suit in this court?

Mr. Kohler: Yes, sir.

The Court: Have you a general appearance?

Mr. Kraushaar: Yes, sir, the vessels appeared and they filed a bond and were released.

The Court: They had some general appearance?

Mr. Kraushaar: Yes, sir, on file in this court.

The Court: As to the case in personam against the corporation, I think you have sufficiently proved that it was not a government owned corporation, but that they were privately operated ships. I do not see how you can dispute that.

Mr. Kohler: But the Consul General will testify that the Transportes Maritimos is a branch of the Portuguese Government, and it is unincorporated. It is headed by this Commissioner Ribeiro, who is an officer of—

The Court: He is in Washington, your Consul General?

Mr. Kohler: No, he is in New York City, and he said——

The Court: Why can't he give his testimony by deposition?

Mr. Kohler: He said he would testify in his Consulate, according to his privilege. If counsel will agree to go there, he will testify to-day.

Mr. Kraushaar: There is no such privilege——

The Court: You have no objection to taking his testimony?

Mr. Kraushaar: No, of course not, but I want to call your attention to this proposition, that on this question as to whether or not they can now show that it is a corporation or not a corporation, I think it is put to rest by this case which I have here in the United States Circuit Court of Appeals.

(Reading same.)

Mr. Kohler: The action in personam I think should fall.

The Court: Why?

Mr. Kohler: On the ground that it is not an entity at all; it is merely a branch of the government.

The Court: Not at all. It is admitted that it is a corporation organized under the laws of Portugal. The answer admits that.

Mr. Kohler: I don't understand it so. I think the answer denies it.

(Authorities read by Mr. Kraushaar.)

The Court: I think I will give a decree for he libellant in the case of DeSimone v. S. S. 'Mormugao' for the amount in full, with interest, amounting to $25,503.73, and I will grant a decree against the corporation for the full amount of $17,775.62. The Court finds it in that way rather than to send this matter to a commissioner to take proof as to the damage. The respondent, after having appeared and answered generally, cannot avail itself of that part of the answer which sets up the special defense of sovereignty in the ownership and operation of the vessels. We might have stricken out that part of the answer and sent the matter to a master to ascertain the damages, but in view of the fact that the libellant has been deprived of what unquestionably is his,

the full amount here awarded to him, he should not be further delayed, but is entitled to a decree. This is particularly the case in view of counsel's admission that he cannot and will not contest the delivery of the goods or the amount which is claimed to be due and owing him. Decree may be presented accordingly.

I decline to further postpone because the proof which counsel for the respondent suggests he would offer from the Portuguese Consul would not change the result, as long as I hold that the defense of sovereignty ownership is not available at this time to either of the respondents."

It is thus clear that Manton, *J.*, changed his views with respect to the claim of immunity made by the defendant, and held that the general appearance was, indeed, a waiver of the right to protest against the assumption of jurisdiction by the court. The trial judge was a member of the same Bench that decided the *Tietjen & Lang Dry Dock Company* case included in the petition for certiorari. He concurred in the opinion of the court, which was unanimous, thus more clearly indicating, that after mature deliberation, that he had erred in his prior decision. This in view of the decisions of this court which shall be referred to below.

POINT I.

There is no question of law of sufficient gravity and importance involved here to require this court to exercise its discretion in issuing a writ of certiorari.

It has long been well settled in this court that where a sovereignty voluntarily appears in the courts of a foreign jurisdiction it waives any right of immunity.

Clark v. *Bernard*, 108 U. S., 436.
Richardson v. *Fajardo Sugar Co.*, 241 U. S., 447.
Porto Rico v. *Ramos*, 232 U. S., 627.
Gunter v. *Atlantic Coast Line R. Co.*, 200 U. S., 273.
Veitia v. *Fortuna Estates*, 240 Fed. Rep., 256.

The cases cited by the petitioner are not in conflict with the views of this court as expressed in the above cases.

That of *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed., 341, was not a case in which the sovereignty filed a general appearance, but was a case where the sovereignty sought to recover upon a contract, and it was held that a counterclaim arising out of a different transaction could not be urged against it without its consent.

The case of the *Luigi*, 230 Fed., 493, was a case wherein, as in the present instance, the vessel was released and a bond given, and then the defendant sought to dismiss on the ground that the vessel

was a publicly owned ship, belonging to a sovereign power. The court held that the bond having been substituted in the place of the ship, the doctrine of immunity of a foreign power could not be invoked.

The case of *Smith* v. *Reeves,* 178 U. S., 436, was dismissed because the court held itself *without jurisdiction of the subject-matter,* and under these circumstances the general appearance could not vest the court with jurisdiction, it being elementary that jurisdiction of the subject-matter cannot be conferred by consent.

In the case at bar jurisdiction of the subject-matter is unquestioned.

The question of waiver of immunity of a foreign power by general appearance was not involved in *Kawananakoa* v. *Polyblank,* 205 U. S., 349, nor was that point therein brought up for review. The territory of Hawaii was originally made party defendant to an action. Upon its protest to the assumption of jurisdiction the bill against it was dismissed. The defendant then asserted that the territory of Hawaii was a necessary party, and without it the action could not be maintained. The court held, however, that Hawaii being a sovereign could not be sued without its consent in view of the fact that Hawaii refused to be made a party defendant to the action; the action was, nevertheless, held maintainable without her.

The case of *Porto Rico* v. *Ramos,* 232 U. S., 627, does not help the petitioner. On the contrary, it is authority to support the respondents, it being held that the immunity of Porto Rico as a sovereign was waived by her general appearance.

In the case of *Porto Rico* v. *Rosaly,* 227 U. S., 270, on the other hand, the court merely held that

Porto Rico was entitled to the same immunity as is accorded to every other sovereign state, but the question as to whether or not by appearance generally and pleading to the merits it waived its right was not discussed.

The case of *United States* v. *Thompson,* decided by this court on January 3, 1922, cited by petitioner, has no application whatever. There was no general appearance by the United States in that case. On the contrary, our action was taken by a writ of prohibition and mandamus to prevent the court from taking jurisdiction in a suit against a ship owned by the United States while engaged in the performance of a governmental function.

In the case at bar the Transportes Maritimos Do Estado, if it be indeed a department of the Portuguese Government, has been pursuing the ordinary business of a merchantman, has purchased merchandise in our ports, and concededly owes our citizens large sums of money, and should not be permitted to escape or gain additional delay on the theory that it is vested with immunity of a sovereignty, especially so, since it did not come in before its ships were released and offer proof as to its alleged sovereign capacity, but preferred to have the ships released upon its furnishing the usual stipulations for value, and then delaying its ultimate responsibility by filing the pleas.

Nor is the decision of the Appellate Division, found in the appendix of the petition, in such conflict with the decisions of the courts of the United States as to authorize the issuance of a writ of certiorari. That decision was based upon the alleged peculiar provisions of the New York Code,

under which that court claims that the voluntary general appearance did not require the defendant to abandon its defense of immunity, citing *Hamburger* v. *Baker*, 35 Hun, 455, 457.

It will be interesting to note that the case of *Hamburger* v. *Baker* was directly disapproved in a later case, by a court of concurrent jurisdiction, in *Reed* v. *Chilson*, 40 St. Rep., 961; 16 N. Y. Supp., 744, where the court wrote:

> "I do not think the case of Hamburger v. Baker was correctly decided, and it should not be followed. My conclusion is that the court has jurisdiction of this action. The defense of a former judgment in this state is not available, for the reason that there was clearly no jurisdiction to render it."

The latter case of *Reed* v. *Chilson* was reviewed by the Court of Appeals, the court of dernier resort, in 142 N. Y., 152, where the court wrote:

> "It is urged that the defendants were obliged to appear and present the facts to the court or suffer default, and, therefore, the appearance was not voluntary. This does not change the effect of the appearance. *When a party does not intend to subject himself to the jurisdiction of the court, he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement,*

provided it has not been waived by his own act. But if the defendant elects to come before the court and there try the questions, he cannot afterwards deny the jurisdiction, or be heard to claim that it was not a voluntary appearance. The court had jurisdiction of the subject of the action.

It will be noted that a petition for reargument is still pending in the Appellate Division and undisposed of at this writing.

POINT II.

Certiorari will not lie. Petitioner's remedy is by an appeal direct to this court from the decree.

It is well settled that certiorari will not lie where an appeal may be taken.

Lau Ow Bew v. *United States*, 144 U. S., 47, 58.
American Construction Co. v. *Jacksonville T. & K. W. R. Co.*, 148 U. S., 372, 385.
Forsyth v. *Hammond*, 166 U. S., 506, 513.
United States v. *Beatty et al.*, 232 U. S., 463.
Richardson v. *Shaw*, 209 U. S., 365.

This court has held in the case of *The Carlo Poma*, 255 U. S., 219, that certiorari will not lie. The court below upon authority of this decision dismissed the appeal. Certiorari, therefore, is not the remedy. On the contrary, the remedy is by a

direct appeal from the District Court of the United States to this court.

POINT III.

The application for a writ of certiorari should be denied.

Respectfully submitted,

CELLER & KRAUSHAAR,
Proctors for Respondent,
Thomas DeSimone.

FRANK J. HOGAN,
Washington, D. C.,
Of Counsel.

February 27, 1922.

279-283

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

(Admiralty 74-111.)

MANUEL A. MATTES and others,
Libelants,

against

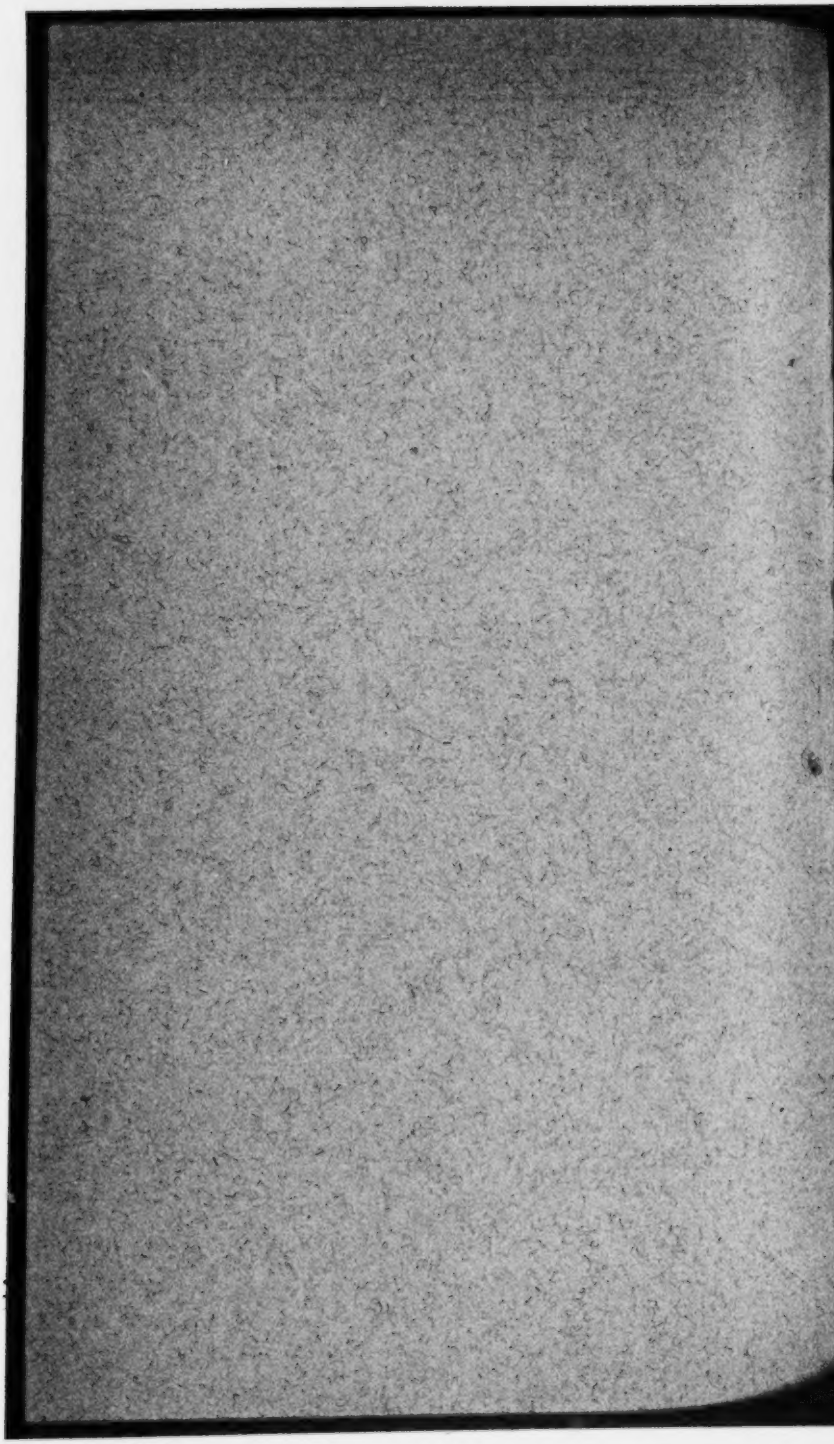
TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

TRANSCRIPT OF COMMISSION TOGETHER WITH RETURN AND EXHIBITS AND TRANSLATIONS FROM RECORD.

SUBMITTED AS EXHIBIT I TO APPELLANT'S BRIEF IN CASES OF TRANSPORTES MARITIMOS DO ESTADO NOS. 279, 280, 281, 282 AND 283, OCTOBER TERM, 1922.

F. DUDLEY KOHLER,
Proctor for Respondent-Claimant-Appellant,
25 Broadway,
New York City.

PRESS OF FREMONT PAINE, INC., 80 Washington St., New York City.



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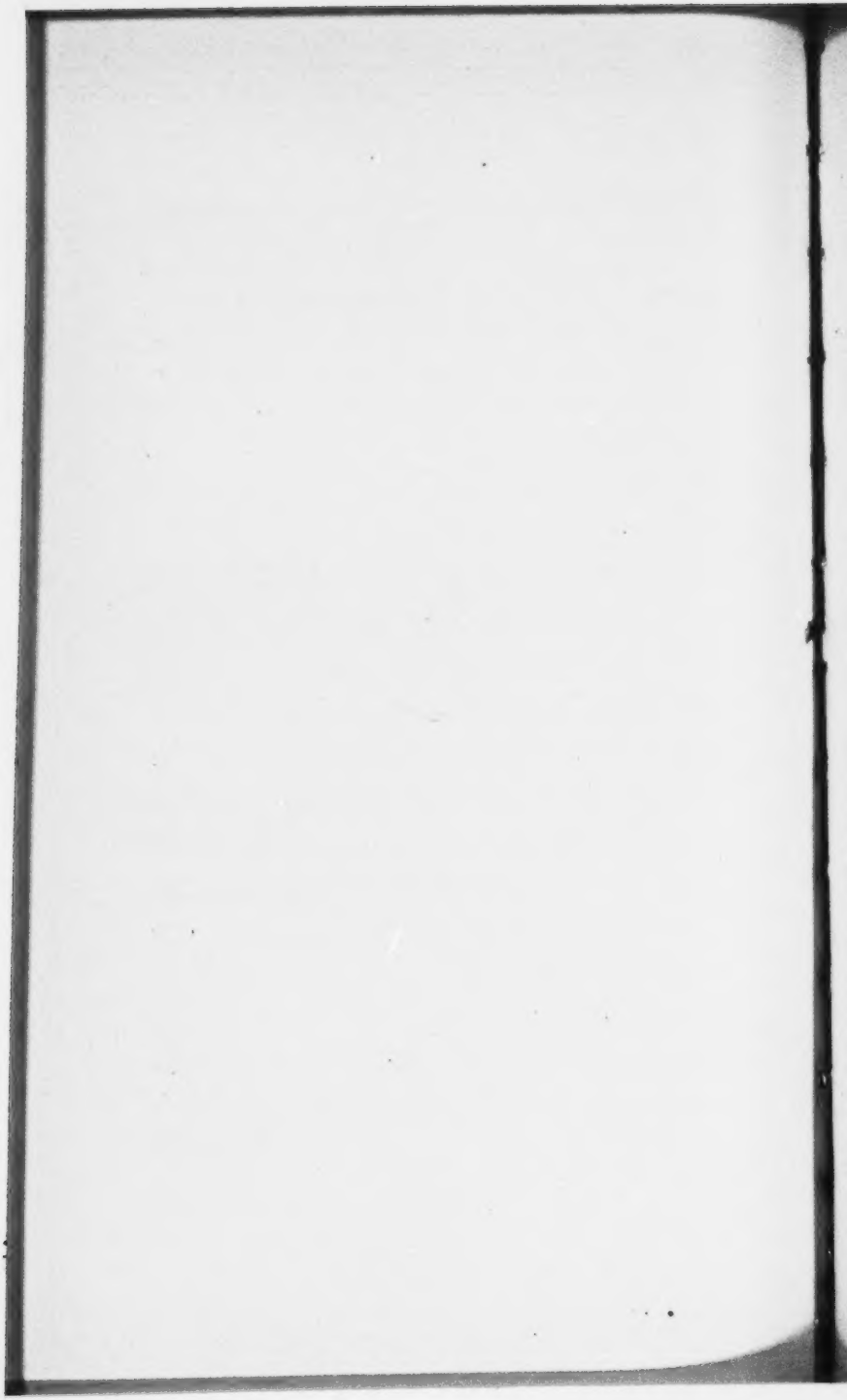

AMERICAN CONSULAR SERVICE
CONSULATE GENERAL
LISBON, PORTUGAL.

August 30, 1921.

The Clerk of the District Court of the United States for the Southern District of New York,
Borough of Manhattan,
City of New York,
United States of America.

Sir:

At the request of Frank M. Patterson, Esquire, Counsellor at Law, of 30 Pine Street, New York City, I send you, herewith enclosed, the completed testimony of Senhor Alvaro Augusto Nunes Ribeiro, taken on Commission issued by the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the Borough of Manhattan, City of New York, on the twenty-sixth day of February, 1921, in the case of MATTES vs. TRANSPORTES MARITIMOS DO ESTADO.

I am, Sir,

Very respectfully yours,

W. STANLEY HOLLIS,
American Consul General.

Enclosures:
Completed testimony as mentioned above
File No. 804.5
WSH/FW

The following appears on the envelope:

AMERICAN CONSULAR SERVICE,
LISBON, PORTUGAL. (in left hand corner)
ALEXANDER GILCHRIST ESQUIRE,
Clerk of the District Court of the United States, for the Southern District of New York,
Borough of Manhattan, City of New York.
United States of America.

Estados Unidas do America Norte.

(stamp) Modêlon 43
Lisboa Central,
R—No. 19323 Portugal.

A—74/111 (written in ink in side)

.....
: A. R. :
.....

On the back of the envelope is written:

Deposited in the Post office at Lisbon, Portugal, this 31st day of August, 1921 by me.

(signed) W. STANLEY HOLLIS,
Commissioner,
American Consul General.

(2 seals of wax containing the American National Seal and the inscription "American Consulate-General, Lisbon, Portugal).

Stamped:
U. S. District Court,
S. D. of N. Y.
Filed Sep. 12, 1921.

.....
: New York, N. Y. :
: 9-12 :
: 1921 :
: Reg'y D. :
.....

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To W. STANLEY HOLLIS,
United States Consul General, Lisbon, or his assistant, deputy or secretary.

GREETING:

KNOW YE, That we, in confidence of your prudence and fidelity, have appointed you Commissioner and by these presents do give you or either of you full power and authority, diligently to examine upon corporal oath, or affirmation , before you to be taken and upon the interrogatories and cross-interrogatories hereunto annexed, Nunes Ribeiro, or in his absence, such other person or official connected with the Portuguese Government who is conversant with the facts and qualified to testify in answer to the questions contained in interrogatories or cross-interrogatories as witness on the part of the respondent in a certain cause now pending undetermined in the District Court of the United States for the Southern District of New York wherein MANUEL A. MATTES and others are libellants and Transportes Maritimos do Estado is respondent.

And we do further empower you,
to examine on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you; and we do hereby require you the Commissioner
before whom such testimony may be taken to reduce the same to writing, and to close it up under your hand and seal directed to Alexander Gil-

christ, Jr., Clerk of the District Court of the United States for the Southern District of New York, at The City of New York, as soon as may be convenient after the execution of this commission; and that you return the same when executed, as above directed, with the title and Docket number (74/111) of the cause endorsed on the envelope of the commission.

WITNESS, the HON. LEARNED HAND, Judge of the District Court of the United States for the Southern District of New York, at The Borough of Manhattan, City of New York, this 26th day of February in the year of our Lord one thousand nine hundred and twenty-two and of our Independence the one hundred and forty-fifth.

(signed) ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States
(Seal) for the Southern District of New York.

DIRECTIONS FOR EXECUTING THE COMMISSION

Extract from the Code of Civil Procedure of the State of New York relating to Depositions taken without the State for use within the State.

§ 901. The person to whom a commission is directed or before whom a deposition is taken unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission, or the order, as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation to testify the truth, the whole truth, and nothing but the truth,

as to the matters respecting which the witness is to be examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness, or other person having it in his custody, does not surrender it, a copy thereof, must be annexed to the deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner, or person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition; he must annex all the depositions and exhibits to the commission, or to a certified copy of the order, for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction on the commission or in the order, to return the same through the post-office, he must immediately deposit the packet, so addressed, in the post-office, and pay the postage thereon.

6. If there is a direction on the commission, or in the order, to return the same by an agent of the party, at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

§ 302. The commisioner or other person, before whom one or more depositions are taken, must subscribe, and annex to each deposition, a certificate substantially in the following form, the blanks being properly filled up;

"State" (or "Territory") "of ....." }
"County" (or "Parish") "of....." } ss.:

"I,
do certify that
the witness, personally appeared before me on the
day of
at o'clock in the noon,
at the , in the State (or "Territory") of and after being sworn, to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and indorse the exhibits annexed thereto. And I further certify that I have subscribed my name to each half-sheet thereof, and to each exhibit. And I further certify that
appeared in behalf of the and that appeared in behalf of the .

The execution of this Commission appears in certain schedules hereunto annexed.

.....Commissioner.

FURTHER INSTRUCTIONS TO COMMISSIONERS

Annexed to the commission is an extract from the Statutes of the State of New York, relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the Commission. But as it does not comprise everything necessary to be attended to by the Commissioners, they are requested to observe the following more ample

INSTRUCTIONS:

I. All the Commissioners named in the Commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting be stated.

II. The Commission must be executed by the *Commissioner* named therein.

III. The acting *Commissioner* will examine the witnesses separately, after publicly administering to them the following oath of affirmation:

"*You do swear* that the answers which shall be given by you to interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels.

But if the witness shall desire it, he shall be permitted to swear in the following form: *"You do swear, in the presence of the ever living God,"* and while so swearing he may or may not hold up his hand, in his discretion.

Or, if the witness shall declare that he has conscientious scruples against taking an oath or swearing in any form, he shall be permitted to make this affirmation in the following form: *"You do solemnly, sincerely and truly declare and affirm,"* omitting the words, "So help me God."

IV. The general style or title of the depositions must be drawn up in the following manner:

"Depositions of *witnesses*, produced, *sworn* (or *affirmed*) and examined, the day of in the year one thousand nine hundred and at under and by virtue of a Commission issued out of the District Court of the United States for the Southern District of New York, in a certain cause therein depending and at issue, wherein plaintiff and defendant as follows:

A. B. of (*insert his place of residence and occupation*), aged years and upwards being duly and publicly *sworn* (or *affirmed*), pursuant to the directions hereto annexed, and examined on the part of the doth depose and say as follows: First—*To the first interrogatory he saith, &c.,* [Insert the witness's answer.] Second—*To the second interrogatory he saith, &c.,* and so on throughout.

If he cannot answer let him say that *he knoweth not.*

V. If there be any cross-interrogatories, the witness will go on thus:

First—*To the first cross-interrogatory he saith, &c.*, and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting Commissioner will certify as follows:

Examination taken, reduced to writing and by the witness subscribed and sworn to, this day of 19 before

Commissioner.

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to, and be subscribed to by the witness, and be endorsed by the acting Commissioners, in this manner.

"At the execution of a Commission for the examination of witnesses, wherein

this paper writing was produced and shown to (*insert the witness's name*) and by him deposed unto at the time of his examination, before

.....*Commissioner.*

VIII. The acting Commissioners shall sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the Commissioners will administer to him the following oath, and certify thereto:

> "You do solemnly swear, that you will truly and faithfully interpret the oath and interrogatories to be administered to a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answer of the said thereto out of the language into the English language."

Let the depositions be subscribed by the interpreter, as well as by witness, and certified by the acting Commissioners, as follows:

> Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this day of 19 before
>
> *Commissioner.*

X. The *Commissioner* will make return on the back of the Commission by endorsement, thus:

> "The execution of this Commission appears in certain schedules hereunto annexed."
> .....*Commissioner.*

XI. The depositions and exhibits (if any) must be annexed to the Commission, and then the Commission, the directions, interrogatories, cross-inter-

rogatories, depositions and exhibits, must be folded into a packet and bound with tape. The acting Commissioners are to set their seal at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus:

U. S. DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

vs.

To Esquire,
Clerk of the United States District Court for the Southern District of New York, Borough of Manhattan, City of New York.

XII. When the Commission is thus executed, made up and directed, it must be returned in the manner specified in the direction of the Commission, if there be any.

XIII. If there be no direction on the Commission specifying the manner in which it is to be returned, then it must either be delivered to the Court *by one of the acting Commissioners personally*, or else be forwarded by some person coming to this place, who must be liable, on his arrival, to make oath, before one of the Judges or the Clerk of the Court:

> "That he received the same from the hands of A. B., one of the Commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the Commission by mail, it is to be deposited by one of the acting Commissioners in the nearest post office, he making the following endorsement thereon:

"Deposited in the post office at
this day of 19 , by
me,

Commissioner."

In case of returning the Commission by a vessel, it is to be deposited by one of the acting Commissioners in the letter bag of such vessel, he making upon the Commission the following endorsement:

"Deposited in the letter bag of the
now lying at

and bound for the port of New York, this
day of 19 ,
by me,

Commissioner."

The Commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the Commission.

If the Commission be returned by an agent, let him be instructed to call on his arrival at this place upon the clerk of the U. S. District Court, Southern District of New York, who will direct him as to its delivery.

(Endorsement on Cover)

A. 74—111

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

MANUEL A. MATTES and others,
Libelants,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

COMMISSION

FRANK M. PATTERSON,
Attorney for Respondent,
Office and Post Office Address,
30 Pine Street,
Borough of Manhattan,
City of New York.

(STAMP)
U. S. District Court
Filed Sep 12 1921
S. D. of N. Y.

The execution of this commission appears in certain schedules hereunto annexed.

(signed) W. STANLEY HOLLIS,
Commissioner,
Consul General of the
United States of America.

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA,
Lisbon, Portugal.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this first day of June, 1921, before W. Stanley Hollis, Consul General of the United States of America.

Lisbon, Portugal,
Consulate General of the
United States of America. } ss.:

I, W. Stanley Hollis, Consul General of the United States of America, do certify that Alvaro Augusto Nunes Ribeiro, the witness personally appeared before me on the first day of June, at 4 o'clock in the afternoon, at my office in the City of Lisbon, Portugal, and after being sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and endorse the exhibits annexed thereto. The execution of this commission appears in certain schedules hereunto annexed.

(Signed) W. STANLEY HOLLIS,
Consul General of the
United States of America,
Lisbon, Portugal.

(SEAL) Service No. 923.
Fee $15.00
(3 fee stamps attached)

The following written on each stamp:
American Consular Service
$5.
Fee Stamp.

And written across the stamp in ink the following:

R. S. C. Lisbon, Aug. 30, 1921.

74-111

At a Term of the United States District Court held in and for the Southern District of New York at the Court House of New York, on the 11th day of January, 1921.

Present—Hon. AUGUSTUS N. HAND, Judge.

MANUEL A. MATTES, et al.,
Libellants,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

Copy of Order.

Upon the pleadings in this action and the affidavit of Howard C. Lake, verified the 6th day of January, 1921, and the order to show cause, dated the same day, and the said motion having come on duly to be heard on the 7th day of January, 1921, and after hearing Howard C. Lake, of counsel for respondent, in support of said motion, and Silas B. Axtell, counsel for libellants, in opposition thereto, and it appearing to my satisfaction that the proctor for the libellants has not stipulated that the respondent is a department of the Portuguese Government, and due deliberation having been had,

NOW, on motion of Frank M. Patterson, proctor for respondent, it is

ORDERED that a commission issue in this action directed to W. Stanley Hollis, United States

Consul General in Lisbon, Portugal, or his assistant, deputy or secretary, to examine, under oath, on interrogatories to be thereto annexed, Nunes Ribeiro, a witness on behalf of the respondent, or in his absence, such other person or official connected with the Portuguese Government who is conversant with the facts and qualified to testify in answer to the questions to be contained in the interrogatories and cross-interrogatories, and that the libellants be at liberty to join in said commission, and it is further

ORDERED that the said commission be executed at such time and place as may be appointed upon notice of the witness, and the questions contained in the interrogatories and cross-interrogatories and the answers of the witness thereto may be taken down either in writing by the said Consul, his assistant, deputy or secretary, or by some one whom he may appoint for that purpose, or may be taken down in short hand in the presence of said Consul, his assistant, deputy or secretary, by a stenographer and may be transcribed from the stenographic notes so taken and a typewritten copy made thereof; and it is further

ORDERED that the said United States Consul, his assistant, or deputy administer the oath to the said witness and take and certify the deposition with all possible speed and return the said deposition, together with any documentary evidence which may be attached thereto, by mail in a sealed envelope, addressed to the Clerk of the United States District Court, Southern District of New York, Borough of Manhattan, New York City; and it is further

ORDERED that the interrogatories and cross-interrogatories, together with the order authorizing the taking of this deposition or copies thereof, be sent by mail to the said United States Consul at Lisbon, Portugal, by the proctor for the respondent; and it is further

ORDERED that all proceedings in this action be, and the same hereby are stayed until three days after the return of the aforesaid commission, and its receipt by the Clerk of this Court.

AUGUSTUS N. HAND,
U. S. D. J.

A True copy.

ALEX. GILCHRIST, JR.,
(Seal) Clerk.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MANUEL MATTES, et al.,
Libellants,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

Interrogatories to be propounded to the witness to be examined in Lisbon, Portugal, under a commission to be issued under an order in the above entitled action recently made by Hon. Augustus N. Hand, District Judge, proposed on behalf of the respondent.

First Question: What is your full name?

Second Question: Where do you reside?

Third Question: What, if any, office do you hold under the Portuguese Government?

Fourth Question: How long have you held such office?

Fifth Question: What are your duties?

Sixth Question: What is the Transportes Maritimos do Estado?

Seventh Question: Is Transportes Maritimos do Estado a department of the Government of Portugal? If so affix certified copies of all documents showing this fact.

Eighth Question: When was Transportes Maritimos do Estado created? If by public decree affix copy of same.

Ninth Question: By whom is Transportes Maritimos do Estado controlled?

Tenth Question: For what purpose is Transportes Maritimos do Estado conducted and operated?

Eleventh Question: Does Transportes Maritimos do Estado operate ships?

Twelfth Question: When and under what circumstances were the ships acquired?

Thirteenth Question: Was the steamship "Goa" operated by Transportes Maritimos do Estado in 1920?

Fourteenth Question: Was the steamship "Cuene" operated by Transportes Maritimos do Estado in 1920?

Fifteenth Question: Who was the captain of the "Goa" the first part of 1920?

Sixteenth Question: Where is he now?

Seventeenth Question: Who was the captain of the "Cuene" the first part of 1920?

Eighteenth Question: Where is he now?

Nineteenth Question: What provision is made by the government of Portugal for the presentation

and determination of sailors' claims for wages? Answer fully and affix copies of any documents supporting the answer.

Twentieth Question: Are the ships operated primarily for the use and benefit of the government?

Twenty-first Question: What are the principal cargoes carried in the ships of the Transportes Maritimos do Estado from Portugal to the United States?

Twenty-second Question: What are the principal cargoes carried in the ships of the Transportes Maritimos do Estado from the United States to Portugal?

Twenty-third Question: Under what circumstances do the ships carry freight for other than governmental purposes?

Twenty-fourth Question: State generally any fact or circumstance not heretofore covered in your answers to the foregoing interrogatories, which you may know concerning the questions whether or not the Transportes Maritimos do Estado is a department of the Government of Portugal?

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MANUEL A. MATTES, et al.,
Libellants,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

Cross-interrogatories to be propounded to Nunes Ribeiro in Lisbon, Portugal, before W. Stanley Hollis, United States Consul General, under an order in the above entitled action made by Honorable Augustus N. Hand, District Judge, 1921, proposed on behalf of the libellants.

CROSS-INTERROGATORIES.

First: In answer to the 7th and 8th questions propounded by the respondent, and when affixing certified copies of all documents and decrees, see to it that they are properly authenticated.

Second: In answer to the 11th question propounded by the respondent, state, if you know, the number and names of the ships operated by respondent herein?

Third: State the name of the captain of the "Goa" the first part of 1920, by whom he was employed, who paid his wages, and from whom he received his orders?

Fourth: If you are an attorney and counselor-at-law or a person authorized by the laws of Portugal to act in that capacity, and if you answer the 19th question of the respondent's proposed interrogatories, state, if you know, whether claims for seamen for wages against the "Goa" or other vessels operated and controlled by the respondents herein, have been or are being commenced and litigated in the courts of Portugal, and if so, in what courts, and state their jurisdiction?

Fifth: Has the Transportes Maritimos do Estado any capital stock or shares of stock in its treasury or outstanding and in the hands of various persons?

Sixth: Are the shares of stock of the respondent herein sold, traded or assigned, and what is their par value and what is their present market value?

Seventh: How many stockholders are there, if you know, and how many directors and officers are there, and their names and positions?

Eighth: If you answer the 20th question of the respondent's interrogatory in the affirmative, state what you mean, that is, what becomes of the funds derived and obtained from the operation and control of these vessels and how are they disbursed?

Fourteenth: Was the captain of the steamship "Goa" in the employ of the Portuguese Government or its naval forces at the time he was said master?

SILAS B. AXTELL,
Proctor for Libellants,
Office and P. O. Address,
No. 9 State Street,
Borough of Manhattan,
City of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MANUEL A. MATTES, et al.,
Libellants,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

Answers of the witness Alvaro Augusto Nunes Ribeiro examined this first day of June, 1921, before W. Stanley Hollis, United States Consul General at Lisbon, Portugal, pursuant to an Order of the United States District Court, Southern District of New York, made by Honorable Augustus N. Hand, a Judge of said Court, dated February 11, 1921.

To the first interrogatory, he answers:

Alvaro Augusto Nunes Ribeiro.

To the second interrogatory, he answers:

Lisbon, Portugal.

To the third interrogatory, he answers:

Director of Transportes Maritimos do Estado under the Portuguese Government.

To the fourth interrogatory, he answers:

Since the 12th of May, 1919.

To the fifth interrogatory, he answers:

Director of all services.

To the sixth interrogatory, he answers:

It is intended for the operation of all steamers seized from several German companies during the war, and considered as good prize of war by the Naval Court.

To the seventh interrogatory, he answers:

Yes. It is a department of the Government of Portugal.

TEXT OF GOVERNMENT DECREE
NO. 5,564 annexed,
ENCLOSURE "A."

In margin is written:
W. STANLEY HOLLIS,
Consul General.

(signed)
ALVARO AUGUSTO NUNES RIBEIRO.
(at bottom of page)

(New page) con't.

To the eighth interrogatory, he answers:

On February 24, 1916. Text of Government decree No. 2,236, annexed, Enclosure "B."

To the ninth interrogatory, he answers:

Directly by the Ministry of Commerce of Portugal.

To the tenth interrogatory, he answers:

The Transportes Maritimos do Estado is conducted with the aim of establishing lines for commercial and passenger services.

To the eleventh interrogatory, he answers:

Yes.

To the twelfth interrogatory, he answers:

They were German steamers interned in Portugal ports during the war and were requisitioned under the terms of Decree No. 2,236, of February 24, 1916.

To the thirteenth interrogatory, he answers:

Yes.

To the fourteenth interrogatory, he answers:

Yes.

To the fifteenth interrogatory, he answers:

Pedro Ferreira Dias de Sousa.

To the sixteenth interrogatory, he answers:

Captain of the steamer "Lima" now at Antwerp.

To the seventeenth interrogatory, he answers:

Jara de Carvalho.

To the eighteenth interrogatory, he answers:

Captain of the same steamer in England.

To the nineteenth interrogatory, he answers:

The Portuguese naval authorities in all Portuguese harbors determine and pay what wages are due.

(Signed)
ALVARO AUGUSTO NUNES RIBEIRO.

(Signed) W. STANLEY HOLLIS (in margin)
Consul General.

To the twentieth interrogatory, he answers:

Yes.

To the twenty-first interrogatory, he answers:

Corkwood, sardines and other food-stuffs.

To the twenty-second interrogatory, he answers:

General cargo, coal, petrol, and fuel oils, etc.

To the twenty-third interrogatory, he answers:

When our ships have not full cargoes for the Portuguese Government, the vacant spact is at the disposal of shippers.

To the twenty-fourth interrogatory, he answers:

He has nothing further to say.

(signed)
ALVARO AUGUSTO NUNES RIBEIRO.
(at bottom of page)

(signed) W. STANLEY HOLLIS,
Consul General (In margin).

New page.

To the first cross-interrogatory, he answers:

I affix authenticated copies of the Diario do Governo, marked A and B, containing the decrees referred to.

To the second cross-interrogatory, he answers:

Yes.

To the third cross-interrogatory, he answers:

Pedro Ferreira Dias de Sousa. He was employed by the Portuguese Government. His wages were paid by the Transportes Maritimos do Estado, and he received his orders from me.

To the fourth cross-interrogatory, he answers:

That he is not an attorney and counselor at law, or a person authorized by the laws of Portugal to act in that capacity and that therefore he sayeth not.

(signed)

ALVARO AUGUSTO NUNES RIBEIRO.

(at bottom of page)

(signed) W. STANLEY HOLLIS,
Consul General (In margin) also in left-hand margin.

New Page

To the fifth cross-interrogatory, he answers:

No.

To the sixth cross-interrogatory, he answers:

There are no shares of stock.

To the seventh cross-interrogatory, he answers:

There are no stockholders. I am the only director, and there are no other officers.

To the eighth cross-interrogatory, he answers:

The funds obtained from the operation and control of these vessels are used up entirely in the paying of the expenses of their operation. The funds are disbursed in the form of cash and checks.

(signed)

ALVARO AUGUSTO NUNES RIBEIRO.
(At bottom of page)

(Signed) W. STANLEY HOLLIS,
Consul General (at bottom of page).

New Page

To the fourteenth cross-interrogatory, he answers:

Yes.

(signed)
ALVARO AUGUSTO NUNES RIBEIRO.
(At bottom of page)
(signature repeated written in red ink.)

Examination taken, reduced to writing, and by witness subscribed and sworn to this first day of June, 1921.

(Signed) W. STANLEY HOLLIS,
Consul General of the United States of America at Lisbon, Portugal.

Consulate General of the
United States of America,
Lisbon, Portugal.

June 1, 1921.

At the execution of a commission for the examination of a witness wherein Alvaro Augusto Nunes Ribeiro appeared, these two annexed documents "DIARIO DO GOVERNO" No. 98 of May 10, 1919, and No. 35 of February 24, 1916, were produced and shown to the said Alvaro Augusto Nunes Ribeiro and by him deposed unto at the time of his examination before me, and by my orders the attached authorization of these documents was obtained from the Portuguese Ministery of Foreign Affairs.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Consulate General this 6th day of June, 1921.

(signed) W. STANLEY HOLLIS,
Consul General of the
United States of America.

(SEAL)

I, W. Stanley Hollis, Consul General of the United States of America, do hereby certify that the signature of ANTONIO DUARTE DE OLIVEIRA SOARES is his true and genuine signature over the official seal of his Department and that he is the Acting Director General of the Portu-

guese Ministry of Foreign Affairs and that his signature as such is entitled to full faith and credit.

Witness my hand and seal this sixth day of June, 1921.

(Signed) W. STANLEY HOLLIS,
Consul General of the
United States of America.

(SEAL)

(The following certificate written in the Portuguese language is translated into the English language below.)

MINISTERIO
dos
NEGOCIOS ESTRANGEIROS

Direccao Geral
dos Negocios Comerciaes
e Consulares

—Reparticao
Processo no.—

Certifico que os dois numeros juntos com as letras *A* e *B* Nros. 98 e 35 do *Diario do Governo* sao números autenticos desse diário, sonde o Governo faz publicar todas as leis, decretos e portarias.

Ministério dos Negócios Estrangeiros, em 3 de Junho de 1921.

O Director Geral Interino
(Signed) ANTONIO DUARTE DE OLIVEIRA SOARES
(SEAL)

I. W. Stanley Hollis, Consul General of the United States of America, do hereby certify that the signature of ANTONIO DUARTE DE OLIVEIRA SOARES is his true and genuine signature over the official seal of his Department and that he is the Acting Director General of the Portuguese Ministry of Foreign Affairs and that his signature as such is entitled to fall faith and credit.

Witness my hand and seal this sixth day of June, 1921.

(Signed) W. STANLEY HOLLIS,
Consul General of the United States of America
(SEAL).

(TRANSLATION.)

Ministry
of
Foreign Affairs.

General Direction
of Commercial and
Consular Affairs

—Department
Process No.—

I hereby certify that both attached copies marked letters *A* and *B* Nos. 98 and 35 of the *Government Daily Record,* are the authentic issue of this daily record, wherein the Government publishes all its laws, decrees and ministerial decrees.

Ministry of Foreign Affairs, the 3rd day of June, 1921.

THE ACTING DIRECTOR GENERAL,
(Signed) ANTONIO DUARTE DE OLIVEIRA SOARES.

(Seal of Ministry of)
(Foreign Affairs.)

(*Translation made by Lillian Adela Rockett, whose affidavit follows.*)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MANUEL A. MATTES, et al., Libellants, against TRANSPORTES MARITIMOS DO ESTADO, Respondent.	L. 74, p. 111.

Lillian Adela Rockett being duly sworn, says: That she resides in the City of New Rochelle, County of Westchester, State of New York.

That she is the person mentioned in the stipulation made by counsel herein dated, New York, July 15, 1922, in which it was agreed that the return upon the Commission hereinafter mentioned may be translated by her. That she is the official translator and interpreter of the Consulate-General of

Spain in the City of New York and she is well educated in the Spanish and Portuguese and English languages.

That deponent received the Commission herein and the documents returned therewith from F. Dudley Kohler, Esq., proctor for the Respondent herein on the 17th day of July, 1922, for the purpose of correctly and accurately translating the parts of the same, which are written in the Portuguese language, to the English language.

That deponent thereupon immediately and to the best of her ability translated each and every word and phrase in the said Commission and return thereon which was in the Portuguese language, into the English language.

That deponent knows the said translation to be a true accurate and correct translation. That deponent this day completed said translation.

LILLIAN A. ROCKETT.

Sworn to before me this
24th day of August, 1922.

MAMIE SCHOMECK,
Notary Public,
New York County,
New York Co. Clerk's No. 688, Reg. No. 4425;
Commission expires March 30, 1924.
(Seal)

NOTE: The following is a translation of the enclosed exhibits returned with the commission herein, photographic copies of which follow this translation.

Saturday, May 10th, 1919. Series1—Number 98.

GOVERNMENT DAILY RECORD.

(Seal of Portuguese Government)

Price of this number 18 (Centavos).

All correspondence, whether official or in relation to subscriptions for the Government Daily Record or announcements for publication must be addressed to the General Direction of the National Printery, as well as for periodicals which are part of this newspaper.

Subscriptions:

The 3 Series	Yearly	24$:	Semester	12$50
Series No. 1	"	11$:	"	6$00
Series No. 2	"	9$:	"	5$00
Series No. 3	"	7$:	"	3$50

Loose Pages: Number of two pages, $05 more than two pages, $03 for each two pages or fraction.

The prices for notices is $24 a line, increasing from $01 (5) for impression of each line, and these must come accompanied by their respective amounts. The literary publications of which two copies are received, will be published gratuitously.

SUMMARY:

MINISTRY OF THE PRESIDENCY.

Decree No. 5:553—resolving that all Civil Service Employees of the different departments in the service of the State, who have the necessary qualifications for immediate advancement of position by seniority or by competition, but because at the time they were under military service and were unable to appear at the tests, are from now on considered in the same condition of competency as those who were free from the military life and were unable to be present at these tests, and were accepted.

MINISTRY OF THE INTERIOR.

NEW PUBLICATION, ratifies decree No. 5:526, published in the Government Daily Record, No. 97, of the 9th of May, 1919, which has raised the salaries and annual stipends for the presidents and effective officials of the Supreme Court of Administration equal to those of the President and Judges of the Supreme Court of Justice.

MINISTRY OF JUSTICE AND WORSHIP.

Decree No. 5:554—introducing several dispositions in reference to judicial expenses.

Decree No. 5:555—discontinuing the services in charge of the Public Ministry in the Commercial Courts of Lisbon.

MINISTRY OF THE NAVY.

Decree No. 5:556—augmenting the list of auxiliary officers of the navy with ten more marine-guards.

MINISTRY OF COLONIES.

Decree No. 5:557—resolving that the offices of the Ministry of Colonies together with those of the Council for the Colonies operate an exclusive office called Offices of the Colonial Council, regulating its system and operation.

MINISTRY OF PUBLIC INSTRUCTION.

Decree No. 5:558—authorizing the Government to contract a loan with the Bank of General Deposits for 500,000$ for the acquisition of land and for the construction of an edifice for a Superior School of Pharmacy in Lisbon and for the acquisition of school equipments and furniture.

Decree No. 5:559—authorizng the Government to contract a loan with the Bank of General Deposits for 250,000$ for the completion of the edifice for the Primary Normal School of Lisbon.

Decree No. 5:560—to consider as gratification the remuneration given to the professors of the Medical University for services rendered in school clinics and for those special subjects which are under their charge.

NEW PUBLICATIONS: Ratified those of Art. 2 in decree 5:491, published in the Government Daily Record, which adpusted the arrangement of group 6, in Science of Phylosophy of the Law School of the Universities of Lisbon and Coimbra.

Decree No. 5:561 authorizing the transfer of the estimate for the Ministry of Public Instruc-

tion for the current fiscal year for the sum of 4,500$, corresponding to the twelfth of April and June of 1919, as the revenue assigned for the services of the Institute of Colonial Missions, inscribed in Chapter 4, Art. 40, for ordinary estimates for the Ministry of the Colonies, under the orders for the years 1918-1919.

Decree No. 5:562, Opening a credit for the sum of 64,300$ to re-inforce the different estimates, listed for distribution for the expenses of the Ministry of Public Instruction, authorized for the fiscal year of 1918-1919.

Decree No. 5:563 opening a special credit for the sum of 15,100$ alloted to meet the salaries due to the personnel listed in the Visiting Schools, together with the costs and disbursements of transportation for the inspectors of the same schools, during the fiscal year of 1918-1919.

MINISTRY OF PUBLIC WORKS.

Ministerial Decree No. 1:772—refusing the petition for a concession for mineral waters made by the Company of Mineral Waters of Melgaco, Ltd., and it is resolved that the new springs called Fonte Do Pego which are State property be employed usefully by the Administration Council of the Laborer's District.

MINISTRY OF SUPPLIES.

Decree No. 5:564—including the reorganization of the "TRANSPORTES MARITIMOS."

Decree No. 5:565—establishing that it be fixed by ordinance of the Ministry of Supplies the different prices of prime necessities.

Decree No. 5:566—abolishing the exportation over-tax of $50 per kilogram of paper.

Decree No. 5:567 adjourning the resolutions in Art. 3 and the only one of Art. 11 in decree No. 4:950, published in the Government Daily Record No. 88, of the 28th of April, 1919, which returned free to commerce and for transportation of corn and rye, barley and the milling products of these cereals.

RATIFIED: decree No. 5:513, and published in the Government Daily Record No. 94, of the 6th of May, 1919, which introduced several resolutions pertaining to the stimulation of the interests of the Colonies supplying oleaginous substances as a national industry.

Ministerial Decree No. 1:774, naming the goods which continue to be dependent on the license of the DIRECCAO GERAL DO COMERCIO EXTERNO for exportation and re-exportation to the Portugese Colonies.

NOTICE.—There was published two Supplements of the Government Daily Record No. 97, of the 9th day of May, 1919 including the following documents:

1st. Supplement.

MINISTRY OF THE INTERIOR.

Decree No. 5:549—adjourning until June 1st, 1919 as the day for the election of Senators and

Deputies for the District of Ponta Delgada, which had been fixed for the 11th day of May of this year.

MINISTRY OF PUBLIC INSTRUCTION.

Decree No. 5:550—posting the list of payments to the teaching personnel of the Universities of Coimbra, Lisbon and Porto, and their respective Colleges, Schools and Institutes.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

2nd Supplement

MINISTRY OF THE INTERIOR.

Decree No. 5:551 assigning the number of electionering meetings for the Council of Sousel.

Decree No. 5:552—authorizing the Chamber of the Municipal Council of Vila Nova de Gaia to collect half a mil for each litre of wine consumed and one mil for each litre of spirituous wines exported by the referred Council by water or land routes.

MINISTRY OF THE PRESIDENCY.

DECREE No. 5:553.

Considering that during the war period the Nation had to resort for a great number of its public

employees among its citizens who, as simple soldiers or as officers of the militia, constituted its army;

Considering that the whole country has the moral obligation not to forget to make sacrifices, of every kind, for their fellow-citizens and therefore complying with their duties;

Considering that, to help and not to forsake, when on returning to their homes, every citizen, especially civil employees, whose lives or careers were affected by their help to the cause of the Republic, Country and Humanity, is to continue to stimulate the love for their native land and maintain a gratitude for the Country that every one of its sons should have;

Considering that one of the best ways to arouse this gratitude is to place, at the very least, these employees under the same circumstances as those who for some reasons could not give their share of help to the army; or those who complied with their military duties, and who in returning were not in condition to continue with the fulfilling of their functions, because incapacitated by the vicisitudes and contingencies of their campaign and because of their services to the army, where some of them remained a long time completely separated from the surroundings of the positions which they occupied during peace time;

Considering that during the length of time which the mobilization of the army lasted, competitive contests were held for the different lists of public

civil service positions, and in which many individuals were unable to partake in because of these conditions, and who found themselves far from their offices;

Considering finally, that those who helped their country with their services, cannot be blamed for these conditions, nor are they in a situation to confront those who peacefully were able to continue without a change in their lives, they will be allowed to qualify for these contests and tests which in most cases demand a long preparation, a great amount of energy, unlimited studies, time and tranquility of life.

It is convenient, under the proposal of the President of the Cabinet and Ministers of the Interior and Ministers of the different other departments, that it may have the powers of law to decree the following:

Article 1st. The Civil Service Employees of the different departments in the service of the State, who meet all the requirements necessary for immediate advancement of position by seniority or by competition, but because of the time that they were under military service they were unable to appear at the contests, are from now on considered in the same condition of competency as those who were free from the military life and were able to be present at these tests, and who passed and who were accepted.

only insertion—Included in the dispositions of this article are all officials who return to the employment of

their positions four months before the opening of the contests, and who have at the very least, six months of consecutive military service to their credit.

Art. 2. The officials which are comprised in the above or in its paragraph shall be placed at the end of the list and classified as approved candidates as per seniority, and cannot be promoted before all those who entered the contents, but shall be entered in their respective lists according to vacancies occuring, and will simultaneously be promoted after the last candidate classified.

Art. 3. After the termination of the valid time set for the contents, always with the understanding that all candidates to the contests have been promoted, then will all officials be promoted who are comprised in the dispositions of this decree, their names being affixed in the respective lists and filling the vacancies as they occur, giving preference to the oldest.

Art. 4. Agreed to revoke all former legislation to the contrary

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The President of the Cabinet, Minister of the Interior and Ministers of all other departments make this public. Government House of the Republic, May 10th, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Juinor—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra— Jorge de Vasconcelos Nunes—Luis de Brito Guimardes

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MINISTRY OF THE INTERIOR.

General Offices of Public Administration.

This having been published with inaccuracies, the following decree is published once again.

Decree No. 5:526.

Considering that when the Political State Council, in 1870, was separated from the State Administration Council, who together formed the Supreme Administration Court, it was assigned to each one of them the sum of 1600$ as salary to each of the officials, and as awarded in 1836 as salaries for Judges of the Supreme Court of Justice, which ranks and honours were recognized and reorganized in 1886.

Considering that in 1890 and 1918 in just consideration the salaries of President and Judges of the Supreme Court of Justice were raised but who still maintained the ancient contribution for the officials of the Supreme Court of Justice, and in whose favor there is the same reason for betterment,

and once this hindrance is removed, the quality existing in the profession of law with judges and officials of the Public Ministry will regain the confidence of the parties and the impartiality of magistrates.

Considering that the salaries of the employees of the offices of the Supreme Court of Administration are not in harmony with those of the other officials in identical category as those of other Ministries, and particularly those of the Ministry of the Interior, of which this office is part.

Considering that with the exception of the provisions made by the litigants, giving room to abuses, and augmenting greatly the work of the Court;

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

May 10th, 1919 805

Considering that the perquisities in the other Courts have been raised maintaining in the Supreme Court of Administration the same budget of the 23rd of February of 1888:

Considering that the increase of expenses is a just reason for improvement of the salaries of the officials, secretary general and employees of the offices of the Supreme Court of Administration and compensated in great part by the order created, and which shall be taken care of by the State;

And because of this, it is decreed, by the Government of the Republic of Portugal, with full power of law;

Article 1. It is ordered, that the annual salaries of the President and effective officials of the Supreme Court of Administration shall be placed on equal footing with the Presidents and Judges of the Supreme Court of Justice, retaining these first magistrates with the rights and favor of the last.

only insertion—It is also prohibited for all employees of the Public Ministries together with those of the Supreme Administration Court to practice their profession of law.

Art. 2. The positions of officials extraordinary of the Supreme Court of Administration are voided.

Art. 3. On the absence for a longer period than thirty days of any of the effective officials the Government can name substitutes, being proposed by the Court by triplicate list, and composed of persons who satisfy the requirements of article 3, of the decree of July 28th, 1888.

only insertion—The substitute shall receive the corresponding salary.

Art. 4. The salary of the Secretary General, first and second clerks, amanuensis, messengers and servants of the Supreme Court of Administration are prohibited to advocate or solicit Court proceedings affecting this same Court.

Art. 5. Decree No. 4:143, of April 23rd, 1918, is not to be applied to the Supreme Court of Administration, but full force and respect must be given to the general dispositions to the decree of February 23rd, 1888, in those parts which are not altered by the present decree.

Art. 6. It shall be raised to double the amounts required in article 1 of the general dispositions in the mentioned decree, of February 23rd, 1888, and the approved budget in this same decree will stand as fixed emoluments, in Nos. 1, 2, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 25, and augmenting by 50 per cent those of Nos. 3. 4, 6, 7, 10, 11, 19, 20, 26, 27, 28, 29, and in 25 per cent those in Nos. 5, 8, 9.

Art. 7. The necessary credit to pay the above commission as disposed in this decree shall be opened with the Ministry of Finances, in favor of the Ministry of the Interior.

Art. 8. Agreed to revoke all former legislation to the contrary.

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey to have this obeyed and protected as completely and fully as it is here contained.

The President of the Cabinet, Minister of the Interior and Ministers of all other Departments, make this public. Government House of the Republic, May 9th, 1919, JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereia—Antonio Joaquim Granjo—Amilcar da

Silva Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Junior —Julio de Pattrocinio Martins—Jodo Lopes Soares —Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis Brito Guimardes.

MINISTRY OF JUSTICE AND WORSHIP

Offices of the Directorship of Justice and Worship

Decree No. 5:554

Owing to the many causes which have aggravated the economic conditions of existence in Portugal, the meaning of the word "poverty" employed in the fiscal laws in the civil proceedings have been modified:

In the name of the Nation, the Government of the Republic of Portugal, in a promulgation, to serve as law, it is decreed as follows:

Art. 1. All accounting pertaining to orphans of the amount not exceeding 120$ are exempt from stamps and fees due in poverty documents.

Art. 2. All accountings for more than 120$ and up to 500$ of emoluments and fees shall be paid as half of the proportions fixed by the laws in force.

Art. 3. The emoluments designated by No. 32 of Article 17 of the budget of emoluments and

judicial fees, approved by law on the 13th of May, 1896, shall be raised to double their amount when the claim is of a superior value to 10,000$ and those of No. 20 in the same article 17 shall be regulated by value of the claims and by terms in No.2 and 3 of the same budget.

Art. 4. The law articles for emoluments designated in No. 4 of article 18 of the budget when these debts are of a superior value to 500$ they shall be modified in the following manner.

Presidentship of Family Council, nomination of referees, auctions, sortition, conferences of heirs and creditors, and conferences of heirs, over claims of accounts, per day if the value of the debts are:

More than	500$ up to	$70
More than	1,500$ up to	1$00
More than	3,000$ up to	1$40
More than	6,000$ up to	2$00
More than	10.000$ up to	2$50
More than	15,000$ up to	3$50
More than	30,000$ up to	5$00
More than	45,000$ up to	7$50

More than 60,000$ up to 100,000$ the emoluments increase from the antecedent 7$50 to a cent for each 20$ exceeding this sum.

More than 100,000$ and up to 200,000$ the preceeding emoluments will be increased by two thirds of this same emolument.

In family councils in which an accounting is made by guardians, curators, administrators or any other act of administration of persons or minors, absentees or incompetents, and if the sums to which the accounting refer and the portions secured legally for each should be more than 120$ these will be regulated by the values fixed in article 2 of this No. 4.

When a second sortition has to be made the value be regulated by the portion into which it is subdivided.

When auctions are ordered in default of payment, whatever may be the value of the debt, should it be of a value more than 120$ the emoluments shall be of 1$40.

In the family councils, especially demanded by the creditors to prove their accounts the regulated value for these emoluments cannot be less than $70.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

Art. 5. It is also substituted in Number 8 of Article 18 of the same budget the following:

To determine the distribution being the value of the debt:

For more than 500$ up to 1,500$...1$20
For more than 1,500$ up to 2,000$...1$80
For more than 3,000$ up to 6,000$...3$00
For more than 6,000$ up to 10,000$...6$00
For more than 10,000$ up to 15,000$..12$00
For more than 15,000$ up to 30,000$..18$00
For more than 30,000$ up to 45,000$..24$00
For more than 45,000$ up to 60,000$..30$00

When more than 60,000$ and up to 100,000$ the preceeding emoluments shall increase from 30$ and from $01 up to 15$ when not exceeding that value.

When more than 100,000$ the preceding emoluments shall increase two-thirds more than this emolument.

From 200,000$ and beyond, nothing more.

When by virtue of a relief or a new judgment has reduced this distribution and because of the new resolution, or when the interested parties do not leave any legatees or creditors, the appropriation in the decree shall be raised to a third more of the regulated emolument according to the amount of the inventory.

When an additional distribution must be conducted, the emolument in proportion to their importance shall be raised and divided according to the terms of the present article.

For the expedition of a conference of heirs over the claims of accounts and for decision of claims presented, $60.

Art. 6. The emoluments mentioned in Nos. 10 and 14, and included in the same Article 18 of the budget, shall be raised to double the amount.

Art. 7. In all orphans proceedings which exceed the value of 2,000$ and up to 5,000$ each citation will carry the lawful registration fees of the notarial offices of edicts of $30; if of a superior value than 5,000$ and up to 20,000$, $40; of superior value than 20,000$ and up to 60,000$, $60; and if of a superior value than 60,000$ according to the fees that are assigned in the civil part of the budget.

Art. 8. For the same kind of processes and in the form indicated before, each summons will carry the lawful notarial fees respectively of $20, $30, $40, according to the fees assigned in the civil part of the budget.

Art. 9. The fees shall be raised to double the amount as assigned in Nos. 19 and 25 of Article 41 of the budget, when the case is of superior value than 10,000$.

Art. 10. The fees shall be raised respectively to 1$20, $50, $40, as assigned in Nos. 7 and 11 of Article 43 of the budget and double those of Nos. 8, 9 and 10, of the same article.

Art. 11. The fees designated in No. 1 of Article 53 of the budget shall be altered in the following manner:

For each citation of creditors or legatees:

In civil or commercial processes, $80. In processes for orphans the same fees which are due in these acts as lawful registration.

For each summons for creditors or legatees, officials of family councils, testimonies, experts and appraisers:

In civil or commercial processes, in cases up to the value of 2,000$, $35.

If the value of these are superior, or in criminal processes, $50.

In orphan's processes:—For a value superior to 2,000$ and up to 5,000$, $20.

Of a value superior to 5,000$ and up to 20,00$, $25.

Of a value superior to 20,000$ and up to 60,000$, $30.

Of a value superior to 60,000$, $40.

Art. 12. In all processes of a superior value to 100,000$ the accountants fees shall be raised to double the amount.

Art. 13. In the terms of this decree, only in the order of orphan's distributions or cases of poverty and debts and which are comprised in the first two orders of Article 170 in the Code of Civil Processes have been altered.

Art. 14. With this and Article 74 of the budget will prevail to determine the value of the cases or to record the accounting of inheritances, presented at the department of finances for settlement of the lawful registration fees.

Art. 15. The processes to which Article 23 refers to in the decree of the 29th of May, 1907, the fees and contributions sholl be for their full amount.

Art. 16. This is to be applied to the Notarial offices of the Commercial Courts of the district of Lisbon and provided in #only insertion# of Article 2 of the decrees of the 26th of May, 1911, and so well provided for in Article 10 of the decree No. 3:978, on the 25th of May, 1918, in the part applicable to this.

Art. 17. The subjects referred to in Article 23 of decree No. 3:968, of May 2nd, 1918, shall be raised respectively to 10$ and 3$, these increases being considered as State income, and which shall be paid by stamps.

Art. 18. In the processes in which there has been an accuser, the stamps and costs shall be according to terms in Articles 48 and 50 of the budget, if the process has been filed for a longer period than three months.

Art. 19. In the criminal process referred to in Article 241 of the latest Judiciary Reforms there will be no charges for either Lisbon or Porto, but in case of a judgment, to the penalty imposed shall be added always, as indemnity to the State, a fine fixed by the judge 1$ and 20$.

Art. 20. In criminal processes which take place in Lisbon or Porto there shall be no charges for seal, but, in case of a judgment, to the penalties imposed shall always be added as indemnity to the

State, a fine and justice tax which the judge shall affix, and which will have the following limits:

For police corrections from 10$ to 30$; in correctional processes, 20$ to 50$; in complaint cases from 60$ to 100$.

#only insertion# In case of incidents the prosecutor must pay the sum of 6$, which shall be given entrance in the Public Treasury.

Art. 21. When a defendant has been absolved the plaintiffs shall pay the fine of indemnity or justice tax referred to in the preceding article.

insert 1. If there should be an appeal the fees as disposed in the judicial budget only shall be collected.

insert 2. If there should be no appeal, the fine shall be collected in the offices of the accountant and the clerks of the processes shall return the respective execution within five days after the transition of the judgment of the case.

insert 3. After citing the defendant for payment and at the end of the 10 days lapse, always that this should have been done, and which must be complied with as set forth in #3 of Article 122 of the Penal Code.

Art. 22. In the deprecation of criminal processes, if there is no accuser, at the conclusion of the deprecating case an accounting shall be made of the costs of the judgment.

Art. 23. Bailers and bondsmen in criminal proceedings are only responsible for the fines and justice tax referred to in the preceding articles.

Art. 24. In the proceedings that have a bailer or bondsman the execution shall be entered in the Court of Transgressions, according to the laws in force, pointing out the respective

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

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certificates with the name of the accused or of his bailer or bondsman, and their place of residence.

Art. 25. All fees which are actually received by the clerks of the proceedings of criminal investigation and transgressions, criminal wards, and those entrusted with criminal registration and officers of criminal proceedings and transgressions, shall be for the State.

Art. 26. Besides the actual salaries, there shall be the following:

Clerks of criminal investigation cases, criminal wards, criminal trials and transgressions, and clerk in charge of the criminal register of Lisbon and Porto, 250$.

Assistant clerks of the criminal wards, trials of investigation and transgressions and

assistants to the clerk in charge of the criminal register of Lisbon and Porto, 150$.

Officers of proceedings in investigation trials, criminal wards, criminal trials and trials of transgressions, 150$.

Art. 27. The tax shall be increased on stamped paper that is stamped or printed, in judicial proceedings, to $05 tax stamp which shall be placed on every page and cancelled in the manner of the regulations in force.

Art. 28. The percentage in favor of the State which is set forth in article 5, and in its # only insert of decree No. 4:566, of the 9th of July, 1918 shall be increased in the Department of Lisbon to 50 per cent, for the Department of Porto a 25 per cent, and for all other departments a 12 per cent.

Art. 29. The Government is authorized to rearrange the budget of emoluments and judicial salaries.

Art. 30. Agreed to revoke all laws to the contrary.

It is resolved therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of all the different divisions they have so agreed and to have this published. Government House of the Republic, May 10th, 1919. JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio

Joaquim Granjo—Amilcar da Silva Ramada Curto —Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Junior—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

DECREE NO. 5:555

Having in consideration that it is to the general interest to better and improve the administration of justice, simplifying and specializing its functions:

Having in consideration that for this improvement it is convenient thereupon to relieve the congestion of service in charge of the Public Ministry in the Commercial Ccurts of Lisbon, owing to the progressive growing of cases in which these magistrates have to intervene, either as principals or assistants, and the difficulties of these: and

Having in consideration that some of the restrictions imposed on them by legislation now in force are not justifiable nor the duties of certain acts which they have been entrusted with:

In the name of the Nation, the Government of the Republic of Portugal it is decreed and promulgated, to be a valid law, the following:

Art. 1. The services shall be discontinued in the offices of the 1st. District of the Commercial

Court of Lisbon of the clerk of the register of this county.

Art. 2. To the actual secretary of the 1st. District is exclusively assigned
the functions of clerk of the commercial register of the county of Lisbon, who will continue to exercise these duties as assigned by the laws now in force, but under this designation.

only insert—All other attributions in charge of this magistrate which are discontinued in this present decree shall be fixed and assigned as belonging to the secretary that shall be appointed for this office, and which is completely provided for by attributions and duties to the secretary of the 2nd District of the same Court.

Art. 3. The guardian of the commercial register of the county of Lisbon will continue to receive the stipend which actually belongs to him as also those fees which by the laws in force belong to him for the duties of commercial registration without laws without loss to the Public Treasury of the portion which belongs to it.

only insert—All other emoluments shall be charged as well as the respective duties for the secretary of this office.

Art. 4. The position of secretary of the 1st. District of the Commercial Court of Lisbon shall only be occupied by an individual with a law career, and of recognized competency.

Art. 5. The expenses of installations, personnel, stationery or any other necessities belonging to the office of the commercial register of the county of Lisbon shall be exclusively in the charge and responsibility of the respective clerk.

Art. 6. From the office of the 2nd. District of the Commercial Court of Lisbon shall be discontinued the duties of archivist in both departments of the same Court.

Art. 7. The files of the Commercial Court of Lisbon are suppressed, and must be incorporated in the files of proceedings or parts which form it.

Art. 8. To the secretaries of the commercial courts of Lisbon and Porto shall be given as emoluments the fees, dues and charges for proceedings and also when they have intervened as principals, seconds, assistants, or in their duties of office, and fiscal duties, when accounting for the Public Treasury, and for any other acts which they may perform, intervene or promote, they shall receive the fees as assigned by the laws in force.

Art. 9. The secretaries of the commercial courts of the counties of Lisbon and Porto cannot advocate the cases in which they have in any way intervened as secretaries, even when they have to perform the duties of mere fiscals.

Art. 10. To the secretaries of the commercial courts belong exclusively the registration fees of either of the respective judgments for the expedition of certain duties or decrees.

Art. 11. Agreed to revoke all former legislation to the contrary.

It is resolved, therefore, that all authorities must comply and put into execution the present decree and enforce it as law, to obey and to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different Departments have so agreed and make this public. Government House of the Republic, 10th of May, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose Deus de Macedo Pinto—Xavier de Silva Junior—Julio de Patrocinio Martins—Jodo Lopez Soares—Leonardo Jose Coimbra—Jorge de Vasconcelo Nunes—Luis de Brito Guimardes.

MINISTRY OF THE NAVY

DEPARTMENT OF THE CABINET

Decree No. 5:556

Considering the duties which must be performed by the auxiliary officers of a squadron during manoeu—

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

vres these shall be superior in number to the officers who form this squadron; and

Having in consideration the enormous disproportion which exists between those in the same squadron and the petty officers appointed for the purpose:

In the name of the Nation, the Government of the Republic of Portugal a decree is promulgated, with full power of law, the following:

Art. 1 The squadron of auxiliary officers for manoeuvres are augmented with ten marine-guards.

Art. 2 This decree is to be enforced immediately, and all legislation to the contrary is to be revoked.

It is resolved, therefore, that all authorities must comply and put into execution the present decree and enforce it as law, to obey and to have this obeyed and protected as completely and fully as it is here contained.

The President of the Cabinet, Minister of the Interior and Ministers of all other departments make this public. Government House of the Republic, May 10th, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de

Macedo Pinto—Xavier da Silva Junior—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

MINISTRY OF THE COLONIES,

General Department of Civil Administration,

1st. Division.

1st. Section.

Decree No. 5:557.

The attribution to the Colonial Council having been greatly amplified, in virtue of the provisions made in the laws which provided for the centralization of the financial adminstration of the colonies in the decree for reorganization of the respective Ministry:

And for this reason it is necessary to endow this same Council with an exclusive secretarial office, equipped in a convenient manner to expedite the different cases that must circulate through it;

In the name of the Nation, the Government of the Republic of Portugal a decree is promulgated, with full power of law, the following:

Article No. 1. The Ministry of the Colonies together with the Colonial Council shall operate an exclusive secretarial office, called offices of the

Colonial Council, entrusted with the duties of registration, preparation and dispatch of all documents, proceedings, consultation of services authorized by this same Council, and appointing immediately for it the necessary employees.

Art. 2. The list of the personnel for this office shall comprise a chief, with the category of first officer of the general department of the Ministry of the Colonies, a second assistant officer, and a third officer, both belonging to the general department of the Ministry of the Colonies, an accountant, who shall form part of the department of the Treasury of the Ministry of the Colonies, with a second officer, a stenographer, two typists, and two substitutes.

#insert 1. The list for the personnel of the Ministry of the Colonies, fixed by the decree of May 8th, 1918, shall be altered to harmonize with the arrangements in this article.

#insert 2. In case of necessity and recognized by the Colonial Council, the dispositions in article 55 and No. 60 of the decree of the 8th of May, 1918, which reorganized the Ministry of the Colonies, shall be applied to the secretarial office of the same Council.

Art. 3. The position of chief of the secretarial office shall be filled by a first or second officer of the general department of the Ministry of the Colonies, and in the position of accountant shall be placed an officer of the Treasury of the department of the Ministry of the Colonies or anyone

who possesses the ability and competency to perform the above duties, and taken from the colonial departments.

only insert. For the nomination for second and third officer of the general department of the Colonial Ministry, what is disposed for in the #only insert of article 57 of the decree of May 8th, 1918, shall be had in mind, should there be any additional employees.

Art. 4. The chief of the secretarial office of the Ministry of Colonies, being temporarily hindered from assisting at the sessions of this same Council, and in his duties as employee of the office, shall be temporarily substituted by the next officer of the department of the Colonial Ministry rendering services at the same office.

Art. 5. The mentioned personnel in article 2, and in conformity to their category indicated in this article, shall be given the salaries designated in Budget A of the decree of May 8th, 1918, and in article 1 of the law of June 30th, 1912 the chief of the secretarial office shall receive a monthly reward of 20$, and the second officer of the Treasury, accountant, the monthly reward of 15$.

Art. 6. The Colonial Council shall put in operation in the shortest possible time the plan for the governing relative to the dispositions ordered concerning their secretarial office.

Art. 7. To be able to meet in the actual saving year the expenses following this law, the Govern-

ment shall open the special credit made necessary by the annulment of the allotment in the budget.

Art. 8. Agreed to revoke all former legislation to the contrary.

It is resolved, therefore, that all authorities must comply and put into execution the present decree and enforce it as law, to obey and to have this obeyed and protected as completely and fully as it is here contained.

The President of the Cabinet, Minister of the Interior and Ministers of all other departments make this public. Government House of the Republic, May 10th, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Juinor—Julio de Patrocinio Martins— Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

MINISTRY OF PUBLIC INSTRUCTION.

General Office.

Decree No. 5:558.

Being of absolute necessity the construction of a proper edifice for the Superior School of Pharmacy;

And considering that the Superior School of Pharmacy is operating under inadequate conditions, being over-crowded and distant from the Medical University;

And considering that it is very urgent to supply this superior school with a definite building, with modern and adequate pedagogic conditions applied under the present manner of instruction, and impossible to be exercised in an establishment having the need for more laboratories than those which it actually possesses; and

Considering that in article 1 of chapter 111 "of expenses" of the law of June 19th, 1902, which created the school of pharmacy, and which orders the application of a stamp on all pharmaceutic specialities creating in this manner an income

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(Signed by) W. Stanley Hollis, Counsel General.
" Alvaro Augusto Nunes Ribeiro.

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which cares for the expenses and the maintenance of the schools in reference.

Considering that the classes in pharmacy, are of great benefit, and met by the respective tax that produces an important income, it is not just that the Superior School of Pharmacy should not have proper and deserving edifices;

And considering that the schools of Coimbra and Porto already are provided with new and appropriate as well as modern edifices and which the Superior School of Pharmacy of this capital does not possess;

The Government of the Republic of Portugal, with the proposal of the Minister of Public Instruction, decrees in a promulgation, with the full power of the law the following:

Art. 1. The Government is authorized to contract a loan with the "Caixa Geral de Depositos" the sum of 500,000$ to acquire land and to construct an edifice for the Superior School of Pharmacy of Lisbon and to obtain school equipment and furniture, with an interest not to exceed 5 per cent., and redeemable in sixty years.

only insert. To meet the interests and amortization of the above loan, the corresponding clause shall be entered in the budget of expenses for the current fiscal year in the above contracting terms.

Art. 2. Agreed to revoke all former legislation to the contrary.

It is resolved, therefore, that all authorities must comply and put into execution the present decree and enforce it as law, to obey and to have this obeyed and protected as completely and fully as it is here contained.

The President of the Cabinet, Minister of the Interior and Ministers of all other departments

make this public. Government House of the Republic, May 10th, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Juinor—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

GENERAL DEPARTMENT FOR PRIMARY AND NORMAL INSTRUCTION.

Decree No. 5:559.

Recognizing the absolute necessity of furthering the immediate completion of the edifice for the installation of the Primary Normal School of Lisbon;

And considering that the delay in the construction work, is due to the exhaustion of the amount authorized in the corresponding law, and that this would cause a deterioration of the incomplete constructions, and also contributing at the same time to aggravate the labor crisis which is actually felt by the laboring classes;

And considering the serious damage which the delay in the construction of the edifices is causing by delaying the regular scholastic sessions of the Normal Schools;

In the name of the Nation, the Government of the Republic of Portugal, decrees in a promulgation, with the full power of law the following;

Article 1. The Government is authorized to contract with the "Caixa Geral de Depositos" a loan for the amount of 250,000$ with interest not to exceed 5 per cent., redeemable in sixty years, and to be applied for the completion of the edifice for the Primary Normal School of Lisbon.

Art. 2. To be able to meet the interest and amortization of this loan, the necessary clause must be inserted in the Budget of General Expenses of the State, in the above contracting terms.

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different departments have this printed, published and circulated. Government House of the Republic, May 10th, 1919. JOAO DU CANTO E CASTRO SILVA

ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier de Silva Juinor—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

GENERAL DIRECTION FOR HIGHER INSTRUCTION.

Decree No. 5:560.

Fixing article 33 of decree No. 4:652 of July 12th, 1918, with the full powers of law, and establishing a reward and remuneration for the professorship of the Clinics of the Medical Universities, whose services have not been awarded;

And as the remunerations of the directing professors of the scholastic clinics or those under hospital services considered as salaries, prevent these professors from receiving their right dues as professors owing to the dispositions in article 63 of the decree No. 4:554 of July 6th, 1918, with full powers of law.

And realizing the necessity of avoiding any endangering of the services in the clinical and other hospitals, and that they may not suffer with inconveniences which may result from the above said reason;

And considering that the resolutions of article 63, restricts the privilege of selection of professors and assistants necessary for the success of instruction in the universities;

In the name of the Nation, the Government of the Republic of Portugal, decrees in a promulgation, with the full powers of law, the following:

Article 1. The compensations conferred on the professors of the Medical Faculties shall be con-

sidered as reward for the services rendered in the scholastic clinics, as well as the other specialties under their charges.

Art. 2. The professors and assistants who teach in universities and occupy other positions and receive the respective salaries or if these should be pay conferred by their military rank according to the law of March 13th, 1884, they shall have the right to select between these salaries and choose the one most suitable. In case of professors with military pay these shall be reduced to two-thirds of the respective pay.

Art. 3. Agreed to revoke all former legislation to the contrary.

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different departments have this printed, published and circulated. Government House of the Republic, May 10th, 1919. JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xaxier da Silva Juinor—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconselos Nunes—Luis de Brito Guimardes.

As some mistakes were made in the Government Daily Record No. 91, Series 1 of the 2nd of this month, article 2 of Decree No. 5:491 shall be republished.

Article 2. The list of professors of group 6 has been augmented by two regular professors and one assistant.

only insert. The first definite filling of vacancies which occur in the list of professors shall be effected according to Article 55, in full force as law, No. 4:554, July 6th, 1918, or without restrictions by the Government, in which case the nomination will fall on persons of recognized scientific aptitude.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

10. DEPARTMENT OF THE GENERAL DIRECTION OF PUBLIC ACCOUNTANCY

Decree No. 5:561

Originated in decree No. 5:259 of May 13th, 1919, and which transferred to the Ministry of Public Instructions the Institute of Colonial Missions which before this was a dependency of the Ministry of Colonies, according to decree No. 4:392, of June, 1918:

In the name of the Nation, the Government of the Republic of Portugal, decree and promulgate with the full force of law, the following:

Article 1. It is authorized to transfer to the Budget of the Ministry of Public Instruction the sum of 4,500$ corresponding to the 12th of April to June of 1919, and approved by the fiscal current year the allotment settled for the services of the Institute of Colonial Missions, entered in chapter 4, article 40, for the budget of ordinary expenses of the Ministry of the Colonies with respect to the present year administration of 1918-1919.

Art. 2. The amount referred to of 4,500$ shall be entered in the budget of ordinary expenses of the Ministry of Public Instruction, according to the following terms:

Chapter 4, article 23:

Subsidy to the Institute of Colonial Missions 4:500$

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different departments have this printed, published and circulated. Government House of the Republic, May 10th, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES —Domingos Leite Pereira — Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—An-

tonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silvo Juinor—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

Decree No. 5:562

Having verified the evident insufficiency in distribution of the different subsidies in the budget for expenses for the Ministry of Public Instruction, in it authorized that during the fiscal year of 1918-1919:

And recognizing the immediate necessity of making payments for the expenses produced by the abnormal circumstances of the monarchical insurrection, as in the cases for services of examinations and prosecutions to which, according to decree with full law force No. 5:203, of May 5th, 1919, some action is urgently needed;

It is convenient also to provide, by amending the articles of the law which are insufficient to meet the expenses for extraordinary services, procure equipment, educational committees, representatives of Congrees and others, which are of imperative urgency.

In the name of the Nation, the Government of the Republic of Portugal, decree in a promulgation with full force of law, the following:

A credit is open with the Ministry of Finances in favor if the Ministry of Public Instruction for the

sum of 64,305$ and which shall be entered in the budget for this last Ministry referred to and distributed according to the chapters and articles hereinafter, in the quotations with their respective designations:

Chapter 2.—General Office of the General Management of the Ministry

Article 5.—Changeable allowances:

Disbursements for extraordinary work ..... 1.500$00

Article 6—Equipment and different expenses:
Procuring furniture ....16,000$00

17.000$00

Chapter 3.—Primary Instruction and Normal Fiscal duties in Primary Education:

Article 11.—A Equipment and Different Expenses:

Installation expenses for the offices of School Registration Inspection 1.200$00
Primary Instruction

Article 17.—Personnel in attendance:
Salaries..... 1.500$00

2.700$00

Chapter 4.—Higher Instruction:

Article 30. — Construction and restorations of the edifices for Colleges .... 1.500$00

Chapter 5.—University Instruction		
University of Lisbon Faculty of Science		
Article 37. — Equipment and General Expenses: Salaried personnel of the Botannical Garden ..		2.100$00
Chapter 8. — Eventual expenses for services of instruction		
Article 67. — General disbursements:		
Assistance in the costs and expenses of transportation for the examination and inspection of instruction establishments	10.000$00	
Aid in the costs and expenses of transportation for the delegation on special studies and for representation in foreign conventions..	33.000$00	
Awards, and aid in the repayment of expenses to the Officers of Special Educational Committees	3.500$00	
		16.500$00

Article 68.—General Expenses:		
Eventual and unlooked-for expenses, including the automobile service for the Minister.....	19,000$00	
Publication authorized by the Minister of Public Instruction	1.000$00	
Subsidies to assist in the expenses in the exchange with foreign countries of scientific and artistic investigations	4.000$00	24.000$00
Total		64.300$00

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different departments have this printed, published and circulated. Government House of the Republic, May 10th, 1919.

JOAO DU CANTO E CASTRO SILVA ANTUNES — Domingos Leite Pereira — Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Junior—Julio de Patrocinio Martins—Joro Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

Decree No. 5:563

Using the faculties authorized to the Government according to article 45 of the decree with the full power of law No. 5:336, of May 24th, 1919, and organizing the services of the Portable Schools:

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

May 10, 1919 811

By proposal of the Ministry of Public Instruction complied with in the dispositions of #insert 3 of Art. 34 of the law of the 9th of September, 1908, and approved by the Ministerial Council:

It has been decreed that a special credit shall be opened with the Ministry of Finances in favor of the Ministry of Public Instruction for the sum of 15.100$, with the object of paying the disbursements for personnel under the list of Portable Schools and to help pay the costs and expenses for the transportation of inspectors of these same schools during the fiscal year of 1918-1919.

The referred amount shall be entered in Chapter 3 in the budget of general expenses of the Ministry of Public Instruction authorized accordingly by the decree in force No. 4:661 of July 11th 1918, in the article before mentioned and under the signatures also mentioned, adding to this said credit the sum of 13.400$ for disbursements in this same

budget and applied to the services of the Portable Schools, and passed by the constitutions in the budget appropriated for the payment of the charges resulting from the reorganization of these same schools, compiled in this manner and make an allotment for the new services to the amount of 28.500$ distributed as follows:

PORTABLE SCHOOLS.

(Decree in force No. 5:336 of March 24th, 1919.)

Article 16.—Personnel: Disbursements for the personnel in the lists	24.400$00
Article 16A—General disbursements: for the costs and expenses of transportation of inspectors of these same schools	500$00
Article 18.—Equipment and general expenses	3.600$00

The disbursements first inscribed in the budget for the current fiscal year as applied to the services of the Portable Schools shall be transferred according to the disbursements of the new services in the following sums:

From Article 16—Salaries	9.500$00
From Article 17—	300$00
From Article 18—Expenses of office, etc.	3.600$00

The Superior Council of the Financial Administration of the State have acceded to this credit according to the legal terms decreed.

The President of the Ministry and the Ministers of all the other Departments have thus agreed to have this executed. Government House of the Republic, May 10th, 1919. JOAO DU CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier da Silva Juinor—Julio de Patrocinio Martins—Jodo Lopes Soares—Leonardo Jase Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

MINISTRY OF PUBLIC WORKS.

Direction General of Mines and Geological Services Mining Department.

Ministerial Decree No. 1:772.

Considering that the Company of Mineral Waters of Melgaco, Limited, have proceeded to appropriate the medicinal mineral waters denominated Fonte de Peso, situated in the parish of Paderno, Municipality of Melgaco, district of Viana do Castelo, without Government's authorization and which is absolutely against the dispositions of article 2 in the decree of September 30th, 1892 and article 2, of article 1 of the ordinances of July 5th, 1894;

And considering that all mineral waters are State properties, and the fundamental principal of this law;

And considering that it is well to carry out an act of social benefit by furnishing the classes not so well provided for with those mineral waters which the State owns;

It is ordered by the Government of the Republic of Portugal and created by decrees No. 5:443 and 5:841 to refuse the petition the concession asked for mineral waters by the Company of Mineral Waters of Melgaco, Limited, and it is resolved that the new spring called Fonte de Paso, as Government property shall be employed usefully by the Administration Council of the Laborers District.

Government House of the Republic, May 2nd, 1919. The Minister of Labor—AUGUSTO DIAS da SILVA.

MINISTRY OF SUPPLIES.

General Office.

Decree No. 5:564.

The war created the necessity of maintaining a Direction General of Maritime Transportation of the State, concentrating in this authority all the powers in relation to mercantile navigation, the first principal of which was of supplying the country.

The object of that organization was to provide supplies, thus obtaining a relative well-being for

the country, and if it was no better, good reasons existed, foreign to its organization, the motives of which have been summarily indicated.

At the moment, however, when the armistice period has ended and the free countries entered in their reconstruction and development period, it is necessary that the national navigation should answer as completely as possible the ends for which it was established, and that it should prove a strong element toward national wealth.

But the voyages made today cannot obey exclusively the spirit of providing the country with first necessities, but must be looked upon with a broader view and with necessary co-ordination to contribute to the national protection.

Because of this, it is absolutely necessary to have a more complete organization by creating an Administrative Council of the Merchant Marine, assisted by a Consulting Committee, which shall make individual studies to gain intelligence and technical knowledge of commercial and colonial matters by constituting a centralization of all great questions of maritime commerce, conditions, voyages and freights.

With the elements which the Administrative Council of Mercantile Marine is provided with, it can grasp the complex problem of the selecting of voyages, resolving as logically as possible, the amount and quality of the cargoes, arranging the general service of all national merchant ships, that these shall work in an homogineal and practical manner, obtaining a regular provisioning of all

the commodities necessary to commerce and the reduction of freights.

The Governent foresees the possibility in the interests of the State, that the Government ships be exploited by private interests, but even in such case the Council as established constitutes an organization which is absolutely indispensible for the State to continue with, and which must continue to superintend the operation of all the national merchant ships regulating and co-ordinating all efforts, fiscalizing these for the general interest, and to be determined by the studied opinion of the delegates and members of the Consulting Committee.

The ships belonging to the Government, grouped administratively under the "Direction of the TRANSPORTES MARTIMOS", constitutes in this way one of the component parts of the

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

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national merchant fleet, and its administration, from a business point of view is subordinated to general economical plans, discussed and executed by the Administrative Council and agreed to by the Consulting Committee.

In this manner, the Direction of the "TRANSPORTES MARITIMOS", will be able to attend

more easily to the technical administration of the fleet of Government ships, the plans of which are in charge of the Council, whose technical administration shall be centralized in a way to work harmoniously and with method, complying in this manner with the object it was established for as a technical department for the benefit of the State.

The Government of the Portuguese Republic, decrees and promulgates, to be valid as law the following:

Article 1. An Administrative Council for the National Merchant Marine is created, as an autonomous department, technical and administrative, with powers to:

1 Regulate and study the voyages and freights of the National Merchant ships classifying these in a manner that their services shall be in harmony with the general interests of the State, applying to the merchant marine all the laws in force;

2 Organizing all the statistical service regarding voyages and freight, by quality and origin of the exports and imports;

3 Authorizing the voyages of the national ships for other purposes besides the supplying of commodities, when circumstances permit;

4 Organizing the service of ship-building, in a manner that would give an impulse to the development and rapidity of this construction.

5 Administering and directing the services of maritime transportation.

Art. 2. The Council of Administration for the Merchant Marine shall be composed of an active officer of the navy, as president and four assistants named by the Government and the Ministry of Supplies, chosen from persons of unquestionable competency each one receiving the same monthly salary as the officials of the executive committee of the Administrative Council of State Railroads, as regulated in the organization and ordinances for State Railroads, and approved by decree No. 5:328 of the 25th of May, 1919.

only insert. The director of the maritime transportation may be present at the meetings of the Administrative Council of the Merchant Marine.

Art. 3. The Administrative Council of the Merchant Maritime will submit to a vote of the Consulting Committee the following subjects;

1 The qualities of the cargoes to be imported or exported, the percentage of freight to be charged on cargoes and advising the respective authorities.

2 The alteration of the laws regulating the different services of the merchant services of the merchant marine;

3 The necessary appointments of national ports that would render the largest revenue and be of the greatest help in the development of the country.

Art. 4. The Consulting Committee shall consist of;

1 A President, President of the Administrative Council of the Merchant Marine.

2 A Vice-president, the delegate of the Ministry of Supplies for the Administrative Council of the Merchant Marine;

3 A delegate from the Ministry of Commerce;

4 Two delegates of the Ministry of Supplies, one of them being a permanent Secretary of the Committee with a monthly stipend of 150$;

5 A representative of the Colonial commerce;

6 A representative of the Commercial Associations;

7 A representative of the Port Works of Lisbon;

8 A representative of the Industrial Associations;

9 A chief of the Department of General Navigation;

10. The Director of Maritime Transportation;

Art. 5. The Department of Navigation which at this date is under the Direction General of Maritime Transportation as well as the Statistical Section shall change and be under the Administrative Council of the Merchant Marine including all its personnel, who shall retain the same salaries received to date and guaranteed by the decree and laws in force.

Art. 6. The salary awarded the President of the Administrative Council of the Merchant Marine is the one established on this date to the extinct office of Director General of the "TRANSPORTES MARITIMOS DO ESTADO", fixed by the laws and decrees in force.

Art. 7. All legislation in reference to the National Merchant Marine shall continue to be enforced, and the fiscalization of its application and interpretation shall be executed by the Administrative Council of the Merchant Marine.

Art. 8. The Administrative Council of the Merchant Marine shall draw up the regulations for its operation, which must be submitted to the Consulting Committee in harmony with the dispositions of this law.

Art. 9. The Direction General of State Maritime Transportation is abolished and a "Direccao dos Transportes Maritimos" is created.

Art. 10. The Director of the Transportes Maritimos shall have the direction of the services of the merchant ships of the Government and maintain the same in the highest commercial efficiency.

Art. 11. The Director of the Maritime Transportation shall have under his charge the management of the following sections;

a) Services of transportation, freights, classification of rates, shippers and relation with the Administrative Council;

b) Accounting inspection;

c) Stevedores services, port equipment, loading and unloading;

d) Machine services, up-keep, conservation and personnel;

e) Workshop service, general repairs and personnel;

f) Services of the Lisbon Agency;

g) Commissariat Services;

h) Warehouse services;

i) Claim office;

j) Custom-House services;

l) Personnel services;

m) Services of ships chartered by the English Government;

n) Coal services;

o) Sanitation service;

p) Services of coal depot and watchmen;

only insert. The services as specified above in quotation a) comprises the colonial service and also foreign service.

Art. 12. The Director in charge of the Maritime Transportation must be a person of recognized competency for the purposes established, and his salary is the one established for the office of Director General of Maritime Transportation which has been discontinued.

Art. 13. All the personnel is proposed by the Administrative Council of the Merchant Marine and appointed by the Ministers, and the chief of the Transportation Agency must be an officer of the navy or merchant marine.

only insert. The balance of the necessary personnel for the different sections according to the above regulations, shall be engaged on contract and those who have held former positions in the "Direccao Geral dos Transportes Maritimos do Estado" are transferred to the "Direccao dos Transportes Maritimos" occupying the same positions and having the same salaries which are fixed by the decree in force on this date, once their appointments have been confirmed by the Director of Maritime Transportation.

Art. 14. The Director of Maritime Transportation shall keep the Superior Council of the Merchant Marine informed of the current commercial movements of its

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

ships and its financial situation by the means of semi-monthly statements, giving in details all the necessary information to estimate the manner in which this was accomplished.

Only insert. Copies of these semi-monthly statements shall be sent to the Ministries of Finances and Supplies.

Art. 15. The "Direccao Dos Transportes Maritimos," transacts business directly with all the authorities.

Art. 16. The "Direccao Dos Transportes Maritimos," shall appoint their agents and its contracts shall be reported to the Administrative Council.

Art. 17. The "Direccao Dos Transportes Maritimos," shall retain guards for the duties of fiscalization and policing, whether on board the Government ships, when at anchorage or for ware-houses and deposits.

Art. 18. The Director of the "Transporte Maritimos" shall have an assistant of his selection as auxiliary, appointed by ministerial decree and with a salary decreed by the law in force for the actual assistant of the Director General of the Transporte Maritimos.

Only insert. This assistant is the direct substitute of the Director.

Art. 19. The expenses resulting from the present decree shall be paid from the income derived of this exploitation.

Art. 5. This decree shall be enforced immediately and all other dispositions to the contrary shall be revoked.

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different Departments have ordered this published, Government House of the Republic, the 30th of April of 1919. JOAO DO CANTO E CASTRO SILVA ANTUNES—Domingo Leite Pereira—Antonio Joaquim Granjo—Amilcar de Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier de Silva Junior—Julio do Patrocinio Martins—Joao Loes Soares—Leonardo Jose Coimbra—Jorge de Vanconcelos Nunes—Louis de Brito Guimardes.

Decree No. 5:565

Considering that the constant variations in prices of different merchandise causes the corresponding fluctuation in the prices of many of the primary necessities;

And considering that at times it is necessary to urgently take into consideration the circumstances

which do not combine with the tardy bureaucratic system;

And considering that it is necessary to provide the Government with sufficient means, in case of urgency, to alter the prices that owing to these circumstances do not possess the full commercial privileges;

In the name of the Nation, the Government of the Portuguese Republic decrees and promulgates to be valid as law the following:

Article 1. The prices of the different commodities for primary necessities shall be fixed according to a ministerial decree of the Ministry of Supplies.

Art. 2. It is agreed to revoke all legislation to the contrary.

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Ministers of the different Departments authorize the publication of this. Government House of the Republic, 10th of May, 1919.—JOAO DO CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto—Antonio Maria Baptista—Vitor Jose de Deus de Macedo Pinto—Xavier de Silva Junior—Julio do Patrocinio Martins—Jodo Lopes Soares—Leonardo Jose Coimbra—Augusto Dias da Silva—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

Decree No. 5:566.

Having in view the petition which was sent to me by the Portuguese Industrial and Commercial Association, of Lisbon, with the object of having decree No. 3:878 revoked in the part ordered to be included in the budget A of decree No. 2:862 of November 30th, 1916, on paper with an overtax of $50 per kilogram;

And considering that the reason which caused the creation of the mentioned overtax no longer exists;

It is for this purpose and by proposal of the Minister of Supplies to decree the following:

Article 1. The export overtax of $50 per kilogram of paper and created by decree No. 3:878 of the 27th of February, 1918, and which was imposed on its exportation to foreign countries and depending on the authority of the General Department of Foreign Commerce for the Exterior, is hereby abolished.

Art. 2. The exports for the Portuguese Colonies do not need this superior authority.

Art. 3. It is agreed to revoke all legislation to the contrary.

The Ministers of Finance and Supplies have thus agreed to have this executed. Government House of the Republic, May 10, 1919.—JOAO DO CANTO E CASTRO SILVA ANTUNES—Amilcar da Silva Ramada Curto—Luis de Brito Guimardes.

Decree No. 5:567.

Considering that, to solve the problem for the supply of meat for the city of Lisbon, it is important to facilitate the economic acquisition of cattle and also to stipulate a reasonable and equitable price for the retail market;

And considering that the difficulties of supplies have been aggravated because of the price list established before this and which does not properly take into consideration the varying prices in the cattle market;

And considering that this fact has given rise to the very just claims of the proprietors of the slaughter-houses, as it is not legitimate to oblige them to sell meat at a lower price than cost.

In the name of the Nation, the Government of the Portuguese Republic decrees and promulgates to be valid as law the following:

Article 1. It is agreed to suspend and to leave without effect the dispositions of Article 3, and #only insert of Article 11 of decree No. 4:950 of November 8, 1918, inasmuch as the new price-list of meat were not organized nor published by the Ministry of Supplies.

Art. 2. The price-list mentioned in the above article shall be arranged by a commission to correspond with the varying quotations of the prices for cattle, according to the various classes.

Art. 3. This decree enters into effect immediately and revokes all legislation to the contrary.

It is resolved, therefore, that the authorities must comply and put into execution the present decree as law, to obey, to have this obeyed and protected as completely and fully as it is here contained.

The Minister of Supplies has agreed to have this executed. Government House of the Republic, May 10, 1919.—JOAO DO CANTO E CASTRO SILVA ANTUNES—Domingos Leite Pereira—Antonio Joaquim Granjo—Amilcar da Silva Ramada Curto —Antonio Xavier da Silva Junior—Julio de Patrocinio Martins—Joao Lopes Soares—Leonardo Jose Coimbra—Jorge de Vasconcelos Nunes—Luis de Brito Guimardes.

Ministerial Decree No. 1:773.

As there is some doubt regarding the interpretation of Article 8 of decree No. 5:450 of the 15th of April last and in its only insert:

The Government of the Portuguese Republic, through the Minister

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

of Supplies, makes clear the faculties conferred on the Ministry when the previous importation license was conceded having had precisely in mind to regulate the conditions in which this importation could be made, otherwise this license would be unnecessary, and would not have been mentioned in article 8, in the same manner as it was not in article 7.

In this manner the Government, through its Ministry of Supplies, reserves the right to requisition, if convenient, a part of the quantity authorized for importation, according to the terms in article 8, and which shall be determined when the respective petitions are granted.

With regards to the #only insert, since in the respective article references are made to the importation of corn "with previous license" and in its paragraph it said "the accidental arrival to ports belonging to the Republic," it is evident that this means that which arrived into port by some unforeseen motive, without a previous license.

Government House of the Republic, May 10, 1919.—The Minister of Supplies, LUIS DE BRITO GUIMARDES.

Correction of Decree No. 5:513 and published in the "Government Newspaper" No. 94, of May 5th, 1919.

In the second line of article 8, which reads "of this origin," should read "from the origin of vegetable oil."

In the fifth line of #insert 2 of article 9, which reads "sending," should read "extending"; and in the eleventh line which reads "of cocoanut oil" should read "and cocoanut oil."

Ministry of Supplies, May 10, 1919. The Director General of Foods, ANTONIO FRANCISCO PEREIRA COELHO.

GENERAL DEPARTMENT OF FOREIGN COMMERCE.

Ministerial Decree No. 1:774

As it is convenient to simplify and facilitate commerce with the Portuguese Colonies, whenever the internal conditions permit, and recognizing that many products can be exported free:

The Government of the Portuguese Republic, through its Minister of Supplies, orders the following:

The following licenses for exportation and reexportation for the Portuguese Colonies continue to be dependent on the Department General of Foreign Commerce until determined to the contrary:

Live animals;
Meats of all kind and prepared in any form;
Lard and bacon;
Cereals and flour;
Vegetables;

Sugar;
Potatoes;
Onions;
Eggs.

All other products can be exported and re-exported to the Portuguese Colonies without superior authority, whenever the internal economic conditions permit.

Government House of the Republic, May 10, 1919. The Minister of Supplies.—LUIS DE BRITO GUIMARDES.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

National Printery of Lisbon.

Fifth Edition, February 24th, 1916.
Series 1—Number 35.

GOVERNMENT OF DAILY RECORD.

All correspondence, whether official or in relation to subscription for the Government Daily Record, or announcements for publication must be addressed to the General Direction of the National Printery, as well as for periodicals which are part of this newspaper.

Subscriptions:

The 3 Series	Yearly	18$:	Semestre	9$50
Series No. 1	"	8$:	"	4$50
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The price for notices is $06 a line, increasing $01 for each impression, and these must come accompanied by their respective amounts. The literary publications of which two copies are received will be published gratuitously.

SUMMARY:

MINISTRY OF THE PRESIDENCY.

Decree No. 2:229, published in the supplement of the Daily Record No. 34 of the 23rd of February, regulating the services and taking the necessary measures for maritime transportation authorized

by the law No. 490, in relation to supplying the country with raw material and merchandise or primary necessities.

MINISTRY OF WAR:

Decree No. 2:231, modifying some of the dispositions in the designs of the uniforms for the army.

Decree No. 2:232, maintaining separate officers divisions for heavy and field artillery as decreed in September 11th, 1915.

Decree No. 2:233, appointing the personnel for the permanent division for the target-ranges of the division of Lisbon.

Decree No. 2:234, approving and ordering the execution of the regulations of the National target-ranges.

Regulations referred to in the above mentioned decree.

Ministerial Decree No. 594, dispensing with the copy-sheets referred to in the regulations of the Military Schools, and to put into execution the plans for trials in physical aptitude and the distribution of enrolment-books for the different ranges of these schools in the fiscal year of 1916-1917.

Program referred to in the above mentioned Ministerial Decree.

Decree No. 2:235, authorizing the admission, by contract, of two pharmacists from the civil classes to the Military Hospital of Lisbon, and fixing their salary.

MINISTRY OF MARINE:

Decree No. 2:236, taking over for the services of the Government the German ships anchored in the port of Lisbon.

Decree No. 2:237, regulating the preparatory work for the services of maritime transportation to be made by the ships taken over, according to decrees Nos. 2:229 and 2:236.

MINISTRY OF THE COLONIES:

Ministerial Decree No. 595. It is determined to adjourn until after the war the validity of the Italian Government's decree, of the 2nd of May, 1915, relative to the admission and residence of foreigners in Italy.

MINISTRY OF PUBLIC INSTRUCTION:

Decree No. 2:230, published in the supplement of the Daily Record No. 34, of the 23rd of February, authorizing the seniors of the University to credit the respective students with the marks against them for different motives and applied in the scholastic regulations.

PRESIDENCY OF THE MINISTRY.

DECREE NO. 2:229

(Published in the Supplement of the Daily Record No. 34 of February 23rd.)

In attention to national economic interests, in relation to the maritime transporation measures

which are daily becoming more difficult and expensive and the lack of ships being the principal reason for these difficulties;

And considering that such reasons affect the actual problem of livelihood and
for the benefit of public salvation it calls for immediate and urgent measures which must be adapted to the imperious necessities of the country;

And in consideration of the dispositions in order 10 of the Law No. 480, of the 7th of February, 1916;

For this purpose and in harmony with this law the Government resolves to decree the following:

Article 1. All measures for the requisition of maritime transportation, authorized by the law No. 480 on the 7th of February, 1916, shall be made by order of the Minister of Marine or through a delegate representing the maritime authorities at whatever place the ships may be.

#1. If the ships are in Colonial Ports, the requisition shall be made through the referred delegate in this article by order of the Minister of the Colonies.

#2. In cases of urgent necessity, the requisitions can be made by the local authorities, in the name of the respective Ministers.

Art. 2. When this requisition is made, written notification shall be sent, with an order naming the acting parties, addressed to the captain or agents of the ships, owners or charterers, or in de-

fault of these, whosoever should represent them, and the execution shall take place immediately.

#Only insert. The notifications shall be sent with a copy, one being delivered to the person notified and the other one shall be caused to certify the delivery of such notification, by being signed by the person receiving the notification, and should this person not be able to do so or refuses to sign, this shall be witnessed by two witnesses whose names, professions and residences shall be affixed therein.

Art. 3. Once this requisition is complied with, an inventory shall be taken as soon as possible of the cargo and other articles not considered part of the ship.

#1. The maritime authorities shall be present at the inventory and also the Consul of the country to which the ship belongs, or its representative, and the two copies shall be signed by both parties, one shall be assigned to the Commission mentioned in article 5, and the other shall be assigned to the Consulate.

#2. Should the Consular authorities or their representatives not assist in this inventory, after having been properly advised, or when they do not exist in the locality, the maritime authorities shall proceed with this inventory in the presence of two witnesses and all of these shall sign.

#3. The cargo and other articles referred to in this article shall be unloaded and transported at the risk and for the account of the owners; when in

Lisbon these shall be removed to the warehouses of this city, and in other ports of the metropolis and colonies, whatever place assigned by the proper custom house authorities.

Art. 4. The requisitions made under the terms of article 1 and its paragraph shall be confirmed by decree and the ships considered Portuguese.

Art. 5. A commission shall be created, together with the Ministry of Marine, with the following object:

#1. To promote the appraisal of the ships and everything pertaining to them.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

#2. To award the amount to be paid for the use of the ships;

#3. To determine the indemnities to be paid through damages, or any deterioration proceeding from the results of the proper use of these ships;

#4. To determine the indemnity to be paid, for any modification made in these ships which might lower their value;

#5. To resolve everything about what is mentioned in reference to supplies and salaries of the

persons who are actually performing these services whether staying in Portuguese Territory or returning to their country.

#Insert 1. The retributions mentioned in No. 2, shall be liquidated in half-yearly payments and shall be deposited in the Bank of General Deposits, and also depositing the corresponding indemnities referred to in Nos. 3 and 4.

#Insert 2. The amounts deposited according to the terms in the above paragraph can be removed by those who have the right to do so, up to the date of the re-transfer of the ships.

Art. 6. The Commission referred to in the above article shall be nominated by the Minister of Marine, and comprised in the following manner:

By 1 captain of the navy and merchant marine, who shall be the president;

By 1 naval construction engineer;

By 1 assistant of the Attorney General of the Republic;

By 1 representative of the Navigation Companies;

By 1 representative of the Commercial Association of Lisbon;

By 1 representative of the Insurance Companies;

By 1 delegate of the Ministry of Finances;

Only insert. The decisions made by this commission shall be submitted to the Ministry of Marine, and by whose final decision it shall abide.

Art. 7. The re-transfer of a ship shall be notified to the owners or their representatives with ten days' previous notice, at the very least, unless agreed to differently and always when possible, this shall be made at the same ports where the requisition was effected.

#1. For the purpose referred to in this article, the owners or their representatives must indicate to the Commission mentioned in article 5, by registered letter, the person residing in Portugal they desire notified.

#2. In default of the above notice mentioned in the preceding paragraph or when this has not been able to take effect owing to the absence of the owners or their representative, the ships after being valued by the appraiser, shall be sold at public auction, properly announced, depositing in the Bank of General Deposits the amount brought by the auction, after having deducted all expenses incurred through this, and all of those incurred because of the inability to perform the above notification.

Art 8. This decree shall be put immediately into execution.

Art. 9. Agreed to revoke all legislation to the contrary.

The Ministers of the different Departments have ordered this executed. Government House of the Republic, February 23rd, 1916—Bernardino Machado—Afonso Costa—Artur R. de Almeida Ribeiro—Joao Catanho de Meneses—

Jose Mendes Ribeiro Norton de Matos—Vitor Hugo de Azevedo Coutinho—Antonio Maria da Silva—Augusto Luis Viera Soares—Alfredo Rodrigues Gaspar—Frederico Antonio Ferriera de Simas.

MINISTRY OF WAR.

Department of the Cabinet.

DECREE No. 2:231.

As it has been necessary to modify the dispositions of the decree of the 25th of August of 1913 and of the 6th of November of the year prior to the last year which introduces several alterations in the designs of the army uniforms; and because of this it is proposed by the Minister of War, to decree that the officers of the different divisions of field artillery, qualified according to the old ranges of the Military School shall use the collar insignia on their riding-coats and dolmans according to fig., 40 of uniform designs published in "ORDERS FOR THE ARMY," No. 16, Series 1. of 1911; and the emblems used by the officers of artillery referred to in line g), of article 19 of the alterations of uniform designs, and approved by decree of the 25th of August 1913, shall be substituted by silver emblems according to fig. 9 of this same alterations, with the same dimensions, according to rank of the division.

The Minister of War has so agreed and has this executed. Government House of the Republic, February 24th, 1916.—BERNARDINO MACHADO—Jose Mendes Ribeiro Norton de Matos.

1st GENERAL DIRECTION.

2nd Department.

DECREE No. 2:232.

The House of Deputies, having, at their session of January 13th of the current year, resolved that it is of unquestionable necessity, that in addition to the orders given in article 465, in the decree enforced by laws of the 25th of May, 1911, and in view of this, that which was enacted and established in article 428 of the same decree, become effective; and in making use of the powers conferred in No. 3 of article 47 of the Political Constitution of the Portuguese Republic, the Minister in like manner proposes the following decree:

Art. 1. That a separate division shall be maintained for artillery officers and field artillery officers, in virtue of the determinations of the decree of the 11th of September, 1915, and in accordance to what is disposed in article 465 and inforced by law of decree enacted on May 25th, 1911.

Art. 2. The promotion of officers for each division referred to in article 1, shall be made inside this same division, according to the terms of article 428, of said article decreed and enforced by law of May the 25th, 1911.

Art. 3. It is agreed to revoke all former dispositions to the contrary.

The Minister of War has so agreed and has this executed. Government House of the Republic, February 24th, 1916.—BERNARDINO MACHADO—Jose Mendes Ribeiro Norton de Matos

4th Department.

DECREE No. 2:233.

Considering that the work, of land condemnation is sufficiently advanced for the alterations and enlargement of the target-practice range of Pedoucos, and which shall soon help to augment the efficiency of this range, and for this purpose it is necessary to have the corresponding additional personnel in charge of this target-practice instructions for regular troops as well as civilians;

And considering that the above instructions have augmented considerably since the actual military organization;

And considering that the number of permanent personnel for this course has had to be increased at different times, and even then without satisfying the growing necessities of service for this same course;

And considering that it is convenient to fix definitely and effectively the referred personnel;

It is thereby, proposed by the Minister of War, under the powers conferred in No. 4 of article 47, of the Political Constitution of the Portuguese Republic, to decree that the number of permanent employees for the target-practice range shall consist of the following:

1 Director, a superior officer of Infantry;
1 Assistant-director, Captain of Infantry;
4 Instructors, Lieutenants of Infantry;
2 Second-sergeants, (who shall be considered supernumeries to the unit to which they

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

belong; 5 corporals and 52 soldiers, all of Infantry.

The Minister of War, has so agreed and has this executed. Government House of the Republic February 24th, 1916.—BERNARDINO MACHADO—Jose Mendes Ribeiro Norton de Matos.

DECREE No. 2:234

As it has become necessary to change the rules of the National target-practice approved by decree of November 27th, 1912, it is hereby, under the powers conferred to me in No. 3 of article 47 of the Political Constitution of the Portuguese Republic, decreed that the regulations for the national target-practice shall be approved and ordered for its execution as transcribed hereinafter:

The Minister of War and of Public Works, have so agreed and put this into execution. Government House of the Republic, 24th of February, 1916.—BERNARDINO MACHADO—Jose Mendes Ribeiro Norton de Matos—Antonio Maria da Silva.

REGULATIONS FOR NATIONAL RANGES

1. The National Target-Practice is an institution for the purpose of extending the desire for shooting exercises and target-practice with artillery, and to perfect in theory and practice through these exercises every Portuguese citizen.

2. The directing, financing and superintending of everything in reference to the national shooting-range belongs to the 4th. Department of the 1st. Secretarial Office of War, and exercised through the respective Inspections of Infantry.

II—Shooting-Societies

3. The formation of Shooting-Societies are allowed on all territory of the Republic.

4. It is understood by "Shooting-Societies," all clubs legally organized which have as a purpose the stimulation of target-practice, and preparing citizens to comply with their military service, and procuring in this manner to awake and stimulate, in every way possible, patriotism, and to further the intellectuality and morality of the country.

a) These societies shall be composed either of civilians or soldiers, all having the same equal rights and duties to perform.

b) The Shooting-Societies with this end in view have the right of guarding the physical education through gymnastics, fencing, manual of arms and by military exercises.

5. The societies shall be designated by:

Shooting Club No..... of..... (name of locality), and are not allowed to use any other name.

a) The Societies and Clubs in existence shall be allowed to use a subtitle to their former name in

the following manner: S. S. No. ..... of..... former F.

6. The Shooting-Societies shall operate together with a shooting range.

a) When in any locality there is no shooting-range, the Shooting-Society trying to organize in that locality shall organize with the respective administrating representatives as a Society of Preparatory Military Instructions, and with the aid of the community shall carry into effect the construction of the shooting-range.

b) The Minister of War shall assist in the construction of one of these ranges in each municipality with a sum as large as possible under the respective budget and appoint as well an officer to make a study of it and direct its construction.

7. These Societies shall be divided in two different classes, and can never be organized or be operated unless it has 20 members for a parish, 30 should it come under a municipality and 50 when in the capital of the district.

8. The Shooting-Societies can have an unlimited number of members.

9. Under section 1. are all Shooting-Societies constituted by young men of school age, up to the age of 16 years, being especially instructed with the preliminary instructions and shooting-practice in a reduced range, and the physical development of the members belonging to it. Section 2. shall

be formed by persons of more than 17 years of age, completing their instruction with the practical knowledge of target shooting.

10. The Preparatory Societies of Military Instruction in existence, or those to be organized and continuing under the name of Shooting-Societies according to these rules are permitted to form under section 1., referred to in number 9, having a preceding authorization from the Ministry of War.

a) These Societies shall be exempt of the tax referred to in No. 27.

11. The Societies with the purpose of developing sports and other games pertaining to this, are permitted to join in both sections for Shooting-Societies, modifying their by-laws with the approval of the Ministry of War, being subject to all the dispositions of these regulations.

2. The actual affiliates of the "Uniao dos Atiradores Civis Portugueses" and other shooting associations existing in the country, must, inside of six months from the date of the publishing of these rules, change their by-laws, to conform with these rules, and submitted for higher approval.

13. The Shooting Societies shall be dissolved:

a) when they should have a smaller number of members than those disposed for in No. 7;

b) when they have deviated in a way from the purposes for which they were created or when they are dedicated to political or religious purposes;

c) when, by any manifested act that could affect the military or social discipline;

d) when they are not complying with integrity the purposes for which they were constituted and whenever verified that the equipments for teaching are deficient in comparison to the number of the associates receiving instructions.

In these last three cases the corresponding Inspector of Infantry shall organize the respective proceeding, and this shall be submitted for the final resolutions to the Minister of War.

14. The Shooting-Societies or other that may organize or change and form under the terms of these regulations, and existing in the same District, can join and form into a District Federation.

a) The federated Societies, in no case will lose their administrative autonomy.

15. The District Federations, shall operate in combination with the shooting range of the Capital of the District, and shall be directed by a commission and organized by the officer in charge of the Preparatory Military Instructions (with residence in the district), and by the Director of the shooting range and by such officials who belong to the federated Societies.

a) The president shall be the highest in rank and the oldest graduated officer as explained in the above article;

b) The federal representation, which is obligatory, can be filled by one of its associates or by a delegate appointed from any of the members of the Shooting-Societies of the Capital of the District;

c) In no case shall it be permitted for an individual to have more than one representation.

16. The District Federations do not need special by-laws, and its principal object is

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

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to be of mutual help to the federated societies and for the improvement and uniformity of these instructions and shall have the following special duties:

a) To conduct, together with the military and civil authorities, all federated societies according to the regulations.

b) To strive and develop target practice in these societies, and taking steps to this end should they judge it necessary;

c) Organizing regional contests;

d) Complying with the orders of instruction given by the Inspector of Infantry and complying with the special motives assigned to it;

e) Sending an annual detailed report to the head-quarters of Infantry Inspection, together with statistical reports giving an account of the movements of the societies and the progress made and a statement of the annual instructions given, work accomplished and those to be accomplished in the year to come, results of the annual contests, etc.

17. All federated societies shall be obliged to pay to the District Federation an annual fee, equal to the 15 per cent of the fees paid by all of the members, to be paid in advance and considered due on January 1st.

18. Any federated society, that after the period of thirty days have failed to pay their fees, order No. 29 shall be applicable in this case.

19. The federations shall be called "Federation of Shooting Societies, in the District of ..... (name of the District).

NATIONAL PORTUGUESE FEDERATION OF TARGET PRACTICE

20. The District Federations and the Societies not federated constitute the National Portuguese Federation of Target Practice.

21. The National Portuguese Federation of Target Practice shall have its head-quarters in Lisbon and in its own building.

22. The National Portuguese Federation of Target Practice at their meetings shall have a representative of the District Federations as well as

other societies not federated, a delegate shall be appointed for each federation, one for each society federated and one for the societies not federated.

a) This representation which is obligatory shall be made according to the terms in line b), of number 15.

23. No delegate can represent more than one society, and all resolutions passed in their meetings shall be valid if voted by the majority of the delegates present, and this must be half plus one of the representatives at the first meeting, not having the 30 original members counted for this purpose, and at the second meeting any number with the right to a vote when present, as agreed.

24. The societies not federated according to district, shall send to the National Federation the proposal for their candidacy as assigned by their Directors, together with a copy of their approved by-laws and list of their members.

a). These societies are also obliged to send a report, according to line e) of number 16, which shall be sent immediately to the corresponding Inspection of Infantry.

25. After the proposal has been received, the National Federation shall remit this copy to the corresponding District Federation, and when no opposition has been made during the period of thirty days, a resolution of admittance shall be passed.

a). All opposition shall be properly established.

26. Should there be any opposition, this shall be submitted to an ordinary meeting for a decision.

27. The federated as well as the non-federated societies shall contribute to the Portuguese National Federation of Target Practice, with an annual quota, paying in advance a fee equal to the 5 per cent, according to the total of their balance-sheets. The modification of the terms in No. 11, for different sports shall also pay a 20 per cent of the total quota of their members subscribing to each of these sports.

28. This contribution shall be considered due on the 30th of January of each year.

29. The District Federations or non-federated Societies who do not pay these fees within thirty days after these are due, shall be excluded from the National Portuguese Federation of Target Practice and dissolved; and shall not be re-admitted unless a special vote to this effect is taken and after a payment is made of all their debts up to date, plus a fine equivalent to a two yearly quota.

30. Besides the members representing the different Societies, the National Portuguese Federation of Target-Practice shall also have as members:

a). A president, named by the Ministry of War, for the period of two years;

b). A chief from the 4th Department of the 1st. General Head-quarters of the Secretary of War;

c). A section chief of the same Department, who shall be in charge of the instructions and target practice;

d). The Directors of the shooting ranges of Lisbon;

31. The meetings of the National Portuguese Federation of Target Practice shall take place at the same time when the national contests are on, allowing them the necessary time to compete for the following:

a). Election of the managing board;

b). Election of the elective members of the technical commission;

c). Election of the propaganda commission;

d). Election of the executive commission;

e). Approval of the accounting of the former managing board;

f). The presentation and discussion of all proposals and matter of general interests;

g). The organizing and discussion of the program for the national contests, when these have not been already organized by the Ministry of War, and other matters which should be settled and put before the board before the 31st. of March.

32. The Technical Commission shall be formed by the two persons mentioned in lines c) and d) of number 30, under the presidency of the Chief of the 4th. Department of the War Office and 5 elected officers.

33. The Propaganda Commission shall be formed by 5 members, also elected.

34. The Executive Committee shall be formed by a President, Vice-president, Treasurer two Secretaries, two actual officers and two substitutes and administrate the National Federation.

35. The Committee of the National Portuguese Federation of Target Practice can have extraordinary meetings:

a) When convoked by the Board of Directors;

b) When a meeting is solicited by more than half of the societies, in this case the meeting shall convoke with two thirds of the signers for the meeting present;

c) When ordered by the Minister of War, who in this case shall pay both ways the transportations expenses of the representatives;

36. Besides the advantages conceded by No. 95. the Government shall also concede to the members of the Federated Societies and through their intermedium a reduction of 25 per cent of the prices for all cartridges used in their free sessions.

37. The National Portuguese Federation of Target Practice, has as a particular object in view the following:

a). To help establish ranges when none and find suitable localities for these, endeavouring for this purpose to obtain the pecuniary co-operation by popular appeal and of the interested societies;

b) To contribute in such manner that the official contests shall have the maximum results either by offering memberships or by the offer of prices:

c). By promoting special shooting contests, tournaments and championships among its members exclusively, and with the admission of foreign contestants when judged necessary, awarding prices and publishing notices, with the understanding that the programs shall have the approval of the higher officers;

d) At the promotion of national and international contests all Shooting Societies shall be represented;

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

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e) To make propaganda through newspapers and other publications, bills and illustrated posters, for the development of the national target practice by public meeting and all other legal means judged convenient and efficient in a manner to awaken the greatest enthusiasm among the Portuguese population;

f) To try and maintain relations with all similar foreign associations by means of direct correspondence or by means of publications.

g) To keep records of the winning contestants of tournaments, championships, local and regional contests.

111 Shooting Instructions

38. The period of target practice instructions shall be between the 1st of March and 31st of October for all ranges, except those of Lisbon and Porto, which shall remain open permanently.

39. The exercises of target practice shall be as follows:

a) In Lisbon and Porto, shall be during all the year, every day and at hours appointed for the instruction of troops;

b) In other localities, on Sundays and holidays, and during other days of the week when so decided by the Inspector of Infantry.

40. The exercises of target practice shall be understood as;

a) Shooting with rest, when and as established by the regulations of infantry target practice;

b) Shooting without rest, with any portable arms, including revolvers, when they are judged to be in good condition by the director of the range.

Practice Shooting

41. The shooting instructions shall always be in harmony with the precepts of the established regulations of infantry rifle practice.

42. The following rules shall be adhered to in the instructions of the preliminary exercises held

in the barracks, in the quarters of the Shooting Societies, and in all teaching establishments, either official or private.

43. It is absolutely indispensable to become a good marksman to hold the rifle firmly and to know how to shoot under all conditions and in these exercises he must give special attention to the instructor.

44. All members of the army and those belonging to the various divisions may exercise in the free open shooting sessions by paying for the ammunition used, at the prices established, less 25 per cent. discount.

IV—Enrolment of sharp-shooters; registration of shooting and register Card of identification

45. All native or naturalized Portuguese are allowed to enroll in the ranges when they reach the age of seventeen years, and minors from 12 to 17 years of age as well as women can have the right to practice with fire arms of short range and of any type, not being obliged to register under the terms of this regulation.

46. All foreigners more than 21 years of age, resident of Portugal, are permitted to practice on the rifle ranges during free session, after having procured the required authorization from the ministry of war.

47. At each range the names of the shooters shall be inscribed in an enrolment book and they shall fill in the blank spaces the information required with truthfulness.

48. The enrolment-books under the following series shall be open to the shooters;

Series A—Territorial troops, not having served in the army;

Series B—Civilians.

49. In each range the shooters shall form in two sections:

To the first section belong all those who are enrolled; To the second section those who have applied for transfer of their enrollment.

a) The shooters of section 1 shall be numbered consecutively within each series, and according to chronological order according to their enrollment papers;

b) The shooters belonging to section 2 shall retain the number which they held in their first range and where they enrolled.

50. All members of the army whatever rank or regiment they belong to, are not allowed to enroll under the rules of this regulation, being limited to practice at the free shooting sessions and the rule established by the infantry shooting practice.

51. The director of ranges shall have entrance to the directing quarters of the Shooting Societies under its jurisdiction, according to the District in which they operate, so as to permit these directors to know at all times, the number of their associates and the number of shooters inscribed as members, obtaining in this manner the advantages conceded in No. 36 for these societies.

a) This obligation shall also be applied to the non-federated societies, although they do not participate in this benefit.

52. The reports with the shooting results shall follow the directions of the infantry shooting regulations already established or to be established for the instruction of troops.

53. The Shooting Societies and the directors of preparatory military instruction centers jointly with the directors of the ranges, shall organize individual records (based on a book-keeping system) and according to models Nos. 2, 3, 4 and 5, registering the results of the shooting sessions by shooters of series A.

54. These individual records, put together under a cover according to No. 6 constituting the individual records of shooters, which, together with the other papers properly indexed, shall make up the files of the NATIONAL TARGET PRACTICE register.

55. When all series of advancement are completed, and the book-keeping records or their duplicates, properly authenticated by the directors of the different ranges are completed, these shall be sent to the president of the Shooting Societies when they can be personally delivered to their associate, by means of a signed receipt.

56. The results of the shooting shall always be transcribed from the memorandum-book of the range personnel.

57. When a sharp-shooter changes his residence and has his matriculation transferred to another range, the director of this last place shall demand

from him an authenticated copy of the respective individual record and enrollment blank, so as to be able to continue this book-keeping.

58. The shooters who have transferred according to the preceding number and have opened a new inscription in the range under section 2 but without a new order number but the one he had in the range where he came from.

59. Besides these individual records and a general register, to be able to estimate the movements in the ranges, contests, prizes distributed, etc.

60. The ammunition with a free donation as well as the payment of these shall be made by the shooters at the ranges and always at the moment of their use; at the moment of using these, personal proofs shall be offered and only in exchange for this will it be supplied.

61. It is absolutely obligatory for the shooter to have his identification card.

62. The members of the Shooting Societies, Preparatory Military Instruction and sports to use cards issued by these societies, presenting these at the first session so as to fill the blanks at the ranges and have it signed by the director should there be one.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

63. The non-affiliated shooters of any of these societies or of those societies who have not adopted the identification card system shall be obliged to follow the instructions in No. 7, and furnished at the ranges.

64. At the presentation of the shooters of their identification card, the shooter shall have the sufficient rights to practice shooting at the free session of any range of the country.

V.—TOURNAMENTS, CHAMPIONSHIPS AND CONTESTS: CLASSIFICATION AND PRIZES FOR SHOOTERS.

65. Official contests shall be held annually: and these shall be local, provincial and national.

a). The local contests shall be organized by the society or societies existing in a parish or council and any person inscribed at the respective ranges can compete:

b). The provincial contests shall be organized by the respective District Federations and if these should not be in existence, the societies of the same district with the intervention of the person in charge of the Preparatory Military Instructions and the range Director: and all shooters inscribed in the district ranges may compete.

c). At the national contests, when not organized by the Minister of War, shall be according to the program established by the National Portuguese

Federation of Target Practice and taking place at the commemoration or anniversary of the proclamation of the Portuguese Republic, when all natives and foreign resident shooters may compete.

Foreigners cannot, nevertheless, participate in the contests which are considered National as the—GOMEZ FREIRE and NATIONAL CHAMPIONSHIP OF PORTUGAL.

66. The rules for local and provincial contests are as follows:

ADMISSION

a). Group A, for all shooters who are prize-winners of any local, provincial, national or international contests:

b). Group B, for all shooters, with the exception of those inscribed in the ranges during the year:

c). Group C, for all shooters inscribed in the ranges during the year:

The shooters of group B and C, when they once have been awarded a prize, shall in all future contests be classified respectively either to group A or B.

SERIES—15 shots in 3 series of 5.

POSITION—5 shots lying down, 5 shots kneeling, and 5 shots standing (this order is arbitrary)

ARMS—6^{mm} rifle, 5 (m/904)

AMMUNITION—Free.

TARGET—Circular with 10 rings, one metre in diametre, 0^{m}, 60 visual.

DISTANCE—300 metres.

CLASSIFICATION:

Each group shall be classified by the largest number of points obtained.

DECISION:

1. By the largest number of hits.

2. By the largest number of hits in the standing series.

3. By the largest number of hits in the kneeling series.

67. In all contests the promoters shall be responsible for the distribution of the prizes according to the rules in the program.

INTERNATIONAL CONTESTS.

68. Once the Pedroucos range is terminated and in condition to be used, all international contests may be held in Lisbon, when all foreign Shooting Societies shall be invited through the National Portuguese Federation of Target Practice, with the previous authority of the Minister of War.

69. The general results of the national and international contests and the names of the individuals or societies who have offered prizes shall be published in the "Army Orders."

ADVANTAGES CONCEDED TO CONTESTANTS FOR THE NATIONAL AND INTERNATIONAL CONTESTS.

The prizes shall consist of:

70. Kind { (a) art objects; (b) monies.

Medals.

Badges.

71. Prizes of art objects as a rule, shall be assigned only to the GOMEZ FREIRE class, although the program may establish others.

72. The medals, which shall only be awarded for contests of the same category as the art objects were assigned to—GOMEZ FREIRE—shall be grouped with other prizes and will consist of: one gold medal and twenty silver ones for each one-hundred shooters inscribed, or of a fraction of one-hundred and more than 50.

73. When money prizes are distributed, these as a rule shall be given to all other classes.

74. To the category receiving Honor Prizes, these shall consist of gold medals, except in the COLLECTIVE CHAMPIONSHIP, when art objects specially appropriated for this shall be awarded.

75. Badges or insignias shall be awarded to record holding shooters and these shall be conferred one per event, having engraved annually thereon the year and distance of the contest competed.

76. All prizes awarded shall be accompanied by their respective diplomas.

77. Medals and diplomas awarded to military men shall be sent directly to the respective corps of divisions in which they serve, and to be given whenever circumstances permit by the commanding officers when in troup formation, taking advantage of the occasion to laud the patriotic motives of this act, and pointing out the importance of knowing how to shoot in this modern era.

78. The awarding of art objects as prizes for groups A, B and C, according to the classes which the distribution is destined for, shall be observed in a general manner as follows:

The disposal of the prizes for series, shall be according to the order of their value, and distributed to the three lots, A1, B1 and C1, in harmony to the number of shooters inscribed in these groups A, B and C. Each of these lots A1, B1 and C1, shall be separated in three others in the following manner:

a	a′	a″	A1
b	b′	b″	B1
c	c′	c″	C1

And with these lots the following lots shall be formed:

a	b	c	(A)
a′	b′	c′	(B)
a″	b″	c″	(C)

We shall obtain finally the prizes which must be distributed accordingly to groups A, B and C, being a (b or c), a′ (b′ or c′), and a″ (b″ and c″) the lots of prizes of successive decreasing value.

(Signed by) W. Stanley Hollis, Consul General.
" ALVARO AUGUSTO NUNES RIBEIRO

24th February 1916 177

79. The awarding of prizes to shooters inside of these groups, shall begin by those with the highest classifications, and they shall be able to choose any prize allotted to be distributed of that lot.

80. The distribution of the prizes shall be awarded on the same day of the contests or on any other day in the course of 8 days, and this act shall be performed with all solemnity.

81. To the winning division or military camp of the Collective Championship shall be applied the rules of the infantry target practice regulations ordered for the shooting championships.

82. When a regimental band is present at the ranges, this shall be asked to play during the solemn moments of prize distribution.

2.

Railroad Transportation

83. All sharp-shooters affiliated to the Shooting Societies, and taking part in the contests, shall be allowed free transportation on all State railroads to Lisbon and back to their home towns.

For this purpose their names shall be sent by the directors of the ranges to the Commandant of the 1st. Division of the army when the contestants are military men, and to the president of a jury when civilians, so that with proper attention they shall pass to the respective guides. On their return the jury shall verify their attendance to the contests.

3.

Distinctive Classification for Shooters

84. All shooters who within the terms of the regulations of infantry target practice have completed their individual target practice shall be conceded the corresponding distinctive classification.

85. Special sharp-shooters shall be given their respective diplomas, which shall be solicited from the Minister of war.

VI. Juries

86. To award the results obtained in the tournaments and championship, and promoted by groups

of shooters of these same societies, a jury shall be formed of the director of the range, the president of the Shooting Society and three officers named by them.

87. In the results of the tournaments and championships, as well as local contests the jury shall be formed by;

President:

An officer of infantry, delegated by the inspector of infantry for the division of the regiment in which the range is located.

Officers

The Director of the range
The administrator of the Council or his delegate
An alderman of the Municipal Council
A president or delegate of the contesting Shooting Societies, federated or not.

Secretary

An inferior officer of infantry

88. At provincial contests the jury shall be formed thus:

President

An inspector of infantry or his delegate

Officers

The civil governor of the district or his delegate.
The director of the shooting range.

The administrator of the council or his delegate

An alderman of the Municipal Council

A president or delegate of the shooting Societies present, either federated or not.

Secretary

An inferior officer of infantry.

89. The officers shall be appointed by the Ministry of War, and the other members who have not been elected to their positions, shall be appointed by the corresponding inspector of infantry.

90. For the National and Inter-National contests the jury shall be nominated by the Ministry of War before the 15th of April and shall be as follows;

President

A General

Officers

The inspector of infantry of the 1st Division of the Army.

Chief of the 4th department of the first Direction General of the Secretarial Office of War or its delegate.

An officer of the Navy

An officer of the Engineer Corps

An officer of Artillery

An officer of Cavalry

A director of the Target Range of Pedroucos

Two Captains of Infantry

A delegate of the Municipal Council of Lisbon

A delegate of the National Portuguese Federation of Target Practice

Three delegates elected by the Shooting Societies

Three delegates elected by the Societies of Preparatory Military Instruction

Three delegates of the newspapers, elected by the directors and journalists of Lisbon's newspapers.

Secretary

A captain or lieutenant of infantry.

91. The president of the jury shall name from among the above appointed persons the necessary number, as he may judge fit, to form the following commissions;

a) directing committee

b) executive committee

c) Propaganda committee

92. The directing Committee have the following duties:

a) To superintend all services, authorize the inscription of individuals who care to do so before the appointed time and after enclosing in their request the identification card, etc.:

b) To adjudge all cases that may arise and not provided for in the regulations, and also all unforeseen claims;

c) Modifying any disposition made in the program, whenever they consider it necessary, except those made for prizes and disposed accordingly for each class, and those modifications must be published on the bulletin board of the range.

93. The Executive Committee have the following duties:

a) To comply with the orders issued by the directing Committee regulating all contests measures, so as to be able to attend to all complaints, whenever possible, of the shooters outside of Lisbon, and proposing to the directing committee the execution of all works they may deem necessary;

b) Verifying with great care the records of the shooting results and make the necessary classification, giving it out for publication and being responsible with the jury for the strict observance of the regulations;

c) To resolve and decide, at the moment, by listening at the offices of the range, all matters pertaining to claims, and the respective books shall always be presented before the directing committee justifying their resolutions;

d) Verifying the compliance of the record services requesting from the Director of Ranges the necessary officers needed to direct the shelters, and also the number of officers necessary to help compare the score cards and the records or registration blanks.

e) To verify, by legal documents, in which group or section the shooters should be inscribed

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

when there is a demand for such made for some special class or group;

f) To classify the different categories of the program to harmonize with the condition demanded for each event, and have it published at the proper time.

g). To verify the number of rifles employed:

h). To demand daily from the Director of the range the arrangements of services for the next day;

i). The secretary of the Executive Committee shall act as secretary for the jury;

94. The Propaganda Committee have the following duties:

a). To try and procure the necessary prizes from different people or different societies;

b). To succeed in securing from all newspapers, principally those of the capital, to publish the results of the contests and help in an intense propaganda for rifle-practice, attracting towards this branch of national instruction the attention of the public;

c). To try and develop a desire for rifle practice in such a manner that this would become a national diversion of the Portuguese public.

VII—ARMS AND AMMUNITIONS

95. The Government shall provide:

1. The necessary material for instruction according to the regulations.

2. The necessary personnel for theoretical and practical instructions.

3. Portable arms of the same models as used by the army.

4. To each inscribed member shall be given:

The necessary number of cartridges needed for his instructions as ordered in the regulation of target practice for infantry recruits.

96. The classification of target practice shall be made according to the rules of the recruits school; the individuals who are not under military service may also shoot, by always paying for the ammunition.

97. To perfect their shooting the shooters can repeat this practice and be classified but by paying for the ammunition used.

98. Necessary cartridges for the repetition of classified shooting and practice referred to in the preceding number shall be sold with a concession of a 25 per cent. rebate from the official prices.

99. The portable arms employed, shall be the same as those used by the army, and of the same class as those the infantry is armed with.

In the free shooting, they may employ any gun once they have satisfied the conditions in line b) of number 40, and contained in the following rules:

a). War arms (muskets, rifles and pistols of the regulation models);

b). War arms, with range finders and modified sighting devises or not;

c). Small arms of precision;

d). Arms of short range and reduced calibre of any system either for ladies or minors.

100. All shooters may rent for their private use, during contests, tournaments and championships one or more rifles, for the price of $1.20 each.

101. All shooters may reserve for their private use one or more rifles, for the price of $10 each.

102. The monies received from the renting or reservation of arms shall be destined for buying portable arms.

103. The rifles rented or reserved may not be used by anybody else but the person renting or reserving these.

104. It is absolutely necessary to present the respective bill every time the shooters shall make use of the reserved or rented rifle.

105. The dispositions in No. 100 shall be applied also to all guns in regular use for the army.

106. At contests, the Ministry of War may authorize the change from one to another range of the arms reserved, or any others.

To those granted this concession shall pay for the transportation of these arms both ways, and the sum of 1$20 each for those not reserved, which shall then be considered rented for use in the said contests.

107. Excepting in disposition Nos. 36, 44 and 98, the ammunition when paid for, shall be sold at the rate of two cent for each cartridge and 1,5 cents for pistols, and shall only be furnished at the shooting line.

108. The cartridge boxes are Government property and cannot be taken away by the shooters.

109. The shooters may acquire other models or types of fire-arms, when those offer the proper guaranty of safety and assurance of their precision and can be used with cartridges provided by the Ministry of War, but with the expressed condition that they shall be left for use at the range according to rules.

110. The safety and precision, as well as the quality of ammunition used in the fire arms brought by shooters, shall be approved by the Director of the respective ranges.

111. The shooters who have reserved rifles may apply more pointed sighting devises as long as they have the same height and may elongate the grooves

in the range finders without losing by this the quality of "war arms."

112. It is also permitted, with rifles which are reserved, to use range finders with other devises, as well as the modification of the sight referred to in the preceding number, in which case the rifle shall be considered under the terms of line b) of No. 99.

113. When with reserved rifles the use of range finders and other devises are permitted, they may also employ the modified high sight, but only when the protective sides exceed.

114. It is prohibited to introduce any devises to the shooting mechanism of arms which come under the terms in line a) and b) of No. 99.

115. It is prohibited to make use of any optic aiming devise in shooting sessions, which have classification value, but notwithstanding, binoculars may be used for observation purposes.

116. The trigger when released must not have a lesser force than 2 kilogram; and for the verification of these last condition, the weight must be attached to the middle of the trigger.

VII—RULES FOR SHOOTERS

MEASURES FOR ORDER, POLICING AND SECURITY

117. The shooters, whatever the class or distinction of rank or degree, while in the ranges, or at

the shooting exercises, must obey all regulations made by the personnel of the range, in all matters pertaining to the technical part of the ranges, as well as discipline at the ranges.

a). The duties imposed in this article do not deprive the shooters of the right of complaining against any act that they may consider as abusive and practised by the instruction personnel of the range.

118. In admitting the public to the range they must, during sessions obey all measures policing and security orders established by the Director or his representatives and these must be rigorously observed.

119. Any violation of the service orders or inattention from the personnel of the ranges after proper steps have been taken in the matter, the infractor shall be tem-

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(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

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porarily or permanently suspended, according to the gravity of the fault committed.

120. The temporary suspension shall be determined by the Director of the range, and the subordinate may apply for recourse of this penalty to

the Infantry headquarters to which the range is attached.

121. The permanent suspension cannot be determined by the Infantry headquarters to which the range is attached to, but in this case shall apply to the recourse of the 4th Department of the 1st Headquarters General of the Secretary of War Offices.

122. When graver faults affecting the discipline are committed by the personnel of the ranges, either by words, threats or other manifestations, the infractor shall be immediately arrested and sent to the respective Judicial Authorities.

123. It is prohibited:

a). To open fire before the proper signal has been given, or to continue firing after the signal to cease has been given;

b). To load the guns out of the shooting line;

c). To leave the shooting line, or to walk through the building with a loaded gun;

d). To have the gun although discharged, with the barrel pointing into the air, and the breech open;

e). To have the gun pointed at somebody, although discharged;

f). To leave the gun in the rack with the breech closed;

g). Addressing a shooters when aiming and ready to fire;

h). To make any movement to open or close the breech or set the trigger without having the barrel pointed toward the target;

i). Not to use rented arms or those reserved or verified;

j). Always when the shooter is interrupted in this shooting sessions by an order to cease firing he shall take his place in front of the shooting platform with the breech open and the arm at rest.

124. It is prohibited to talk loud in the inclosure of the range or to practice or do anything which may disturb the regular shooting sessions or distract the shooters.

125. Individuals who are simply spectators cannot on any account occupy the place reserved for the shooters.

126. The shelters cannot be visited without a special authorization from the Director of the range or his representative.

127. Shooters should only load their guns at the moment of firing.

128. The loading shall be made shot after shot, unless a cartridge clip is used.

129. In front of every shooter shall be placed a rack holding the exact number of cartridges to be fired at each series.

IX—DIFFERENT DISPOSITIONS

130. After the formation of the National Portuguese Federation of Target Practice the plan for a distinctive mark for its members, Federated Societies and banners for these same societies shall be submitted for the approval of the Ministry of War.

131. No range planned by private or local initiative can be constructed and begin to operate unless this plan has been submitted to the Ministry of War and obtained the necessary approval.

a). When a range has been abandoned or condemned, although created by private or local initiative, or through the dissolution of the society which made it, all the material for instruction and arms, even though acquired by private property and of persons duly authorized to have them, shall revert to the Ministry of War.

132. The installation of the reduced shooting galleries depend on the approval and fiscalization of the corresponding Infantry head-quarters.

X—GENERAL DISPOSITION

133. The enrollment of the shooters, as determined, shall be performed immediately.

134. For the shooters who have enrolled before, a new enrollment book shall be opened according to the terms of these regulations where they shall re-enroll as they appear.

135. The shooters who do not enroll again shall be placed in the extinct series list.

136. The shooters who according to the preceding terms of this regulation and who have already been provided with one hundred cartridges to be used according to the orders of list 2 and class 1, shall cease to have this free donation.

137. Members in Lisbon belonging to the United Civil Portuguese Shooters, shall change their organization and reorganize as a Shooting Society, taking under their charge the assets and liabilities of their former organization.

138. In consideration of the many services rendered to the national target-practice by the United Civil Portuguese Shooters, and in view that this association from now on is included under the No. 7 of these regulations, it shall be known and inscribed under the name of Shooting Society No. 1, and may use as a sub-title the name by which they are actually known and designated.

Government House of the Republic, February 24th, 1916.—JOSE MENDES RIBEIRO NORTON DE MATOS.—Antonio Maria da Silva.

(The models referred to in this decree are published in the edition of the "Army Orders" No. 2, 1st Series, of the 24th of February.)

MINISTERIAL DECREE NO. 594.

As it was not possible to comply in full with the dispositions of # insert 3, of Article 67 of Regulations for Military Schools, and taking into consideration that it is not so much the necessity for promotions as the absence of minor officers in some of the divisions that makes it indispensable for the good of the service to augment the number of candidates for admittance to the Military Schools, and to facilitate as much as possible this same admittance: The Government of the Portuguese Republic orders through the Ministry of War and in conformity with the unanimous deliberation of the Council of Instructions of said school, to dispense at the next scholastic term of 1916-1917 with the written essays referred to in Article 56 and 65 of the mentioned school regulations, and to publish and put into execution the plans for the trials of physical efficiency necessary for admission and enrollment in the different army courses and for military administration of the scholastic term of 1916-1917, and approved by that Council of Instruction, according to terms in # insert 3 of Article 67 for Military School regulations.

PLANS FOR PHYSICAL EFFICIENCY TRIALS AND FOR ADMISSION AND ENROLLMENT IN THE DIFFERENT ARMY COURSES AND FOR THE MILITARY ADMINISTRATION OF THE SCHOLASTIC TERMS OF 1916-1917 REFERRED TO IN THE MINISTERIAL DECREE OF THIS DATE.

These trials shall consist of the following exercises:

1. To run over a course of 100 metres in 5 minutes.

2. A running jump over a stone wall 0m.80 in height and of 0m.10 in width at the top.

3. Running jump over a ditch of 2m.8 in width with 1m.2 in depth, with a slope of an inclination of 2/1.

4. Climbing up a rope to a height of 2m.5.

5. Walking on a horizontal beam of wood of 5 metres in length and placed at 2 metres high from the ground.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

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6. Throwing a weight of 4k 750 to a distance of 4 meters.

The candidates have the right of repeating in 18 seconds.

The candidates have the right of repeating once the jump, throwing the weight and walking on the beam exercises.

The exercises shall be executed in the indicated order as given above, having the minimum interval of three minutes after exercises No. 1 and 6, and 5

minutes after No. 3, the other exercises shall be done one after the other in succession.

The distance between the stone wall and the ditch shall be of thirty metres.

The non-execution of any of these exercises means the exclusion of the candidate.

Government House of the Republic, February 24th, 1916.—JOSE MENDES RIBEIRO NORTON DE MATOS.

2nd. GENERAL DIRECTION.

DEPARTMENT 5.

DECREE NO. 2:235.

As it is necessary to fix the wages to be paid the assistants from civil pharmacies and who were pressed into service owing to the urgent need of pharmacists for the Military Hospital of Lisbon, services which have grown to a great extent since some time past; and in accordance to the dispositions in article 21, with the object of changing the public accountancies, and approved by the law of the 20th of March, 1907, and because of this the following is decreed:

Only Article. In regards to the Military Hospital of Lisbon and the settlement to be made for the auxiliary pharmacist and indispensable for the performing of the necessary services, two civil

assistant pharmacists may be engaged, each receiving for such extraordinary services a no larger remuneration than 25$00 per month, and paid for from the amount of 6.260$00, according to article 8 chapter 1 and unfolded in the budget for expenses for the fiscal year of 1915-1916, and agreed to by the law of August 31, 1915.

The Minister of War has so agreed and has this executed—Government House of the Republic, February 24th, 1916.—BERNARDINO MACHADO—JOSE MENDES RIBEIRO NORTON DE MATOS.

MINISTRY OF MARINE.

Offices of the Minister.

DECREE No. 2:236.

Making use of the power conceded me by law No. 480, of February the 7th of 1916, and according to the terms of decree No. 2:229, of the 23rd of the same month, and by proposal of the Government, I hereby decree the following:

Only Article. The ships hereinafter mentioned anchored at the port of Lisbon shall be requisitioned for the services of the Government:

GERMAN:	Tons
ARKADIA	1:106
ACHILLES	580
ANTARES	1:529
BULOW	5:034

CASA BLANCA	1:043
CHERUSKIA	2:047
ENOS	1:210
EURIPOS	1:747
ELECTRA	417
ENERGIC	452
GALATA	2:580
GIRGENTE	1:036
JAFFA	1:263
LANECK	786
LUBECK	1:055
MILOS	1:758
MAZAGAN	1:110
MOGADOR	785
MAILAND	1:030
MINA SCHULDT	616
MAXOS	1:389
NEWVA	98
PICADOR	327
PLUTO	892
PRINZ HENRICK	3:386
PHOENICIA	2:185
ROLANDSECK	757
ROTTERDAM	1:385
RHODOS	1:220
SOPHIE RICKEMERS	2.262
TAYGETOS	1:817
UCKERMARK	2:652
WUTEMBERG	4:829
WESTERVALD	2:390
SANTA URSULA	2:340

The Ministers of the different Departments have thus agreed to have this executed. Government

House of the Republic, 24th of February of 1916.—BERNARDINO MACHADO—Afonso Costa—Artur R. de Almeida Ribeiro—Joao Catanho—de Meneses—Jose Mendes Ribeiro Norton de Matos—Vitor Hugo de Azevedo Coutinho—Augusto Luis Viera Soares—Antonio Maria da Silva—Alfredo Rodrigues Gaspar—Frederico Antonio Ferreira de Simas.

DECREE No. 2:237.

As there is urgent necessity to attend and initiate the preparatory work for the services of maritime transportation to be made by the requisitioned ships, in accordance to decree No. 2:229, of the 23rd, of February of 1916, and putting into effect this power which has been conferred on me by the law No. 373 of September 2, 1915, and No. 480 of February 7th, 1916: and with this purpose, the Government proposes to decree the following:

Article 1. The requisitioned ships, in accordance to decree No. 2:229 of the 23rd of February of 1916 the requisition of which was confirmed by decree No. 2:236 of the 24th of February of 1916, are from now on under the administration of a Commission composed as follows:

1 Officer of the Navy.

1 Officer Engineer.

1 Officer of the Naval Administration.

Art. 2. The duties of this Commission, with the approval of the Minister of the Navy are:

1. To promote, when they should judge it convenient, all indispensable duties, reparations and application of the requisitioned ships;

2. To acquire material for permanent use or consumption, should it be necessary for their services;

3. To consult with technical persons when necessary;

4. To engage the office staff and management needed.

Art. 3. A special credit is opened with Ministry of Finance in favor of the Ministry of Marine for the sum of 600.000$ to cover the first expenses that may result from the execution of this decree and from decree No. 2:229 of the 23rd, of February, 1916.

Art. 5. It is agreed to revoke all legislation to the contrary.

The Ministers of all the Departments have so agreed and have this executed.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

Government House of the Republic, February 24, 1916.—Bernardo Machado—Afonso Costa—Atur R. de Almeida Ribeiro—Joao Catanho de Meneses—Jose Mendes Ribeiro Norton de Matos—Vitor Hugo de Azevedo Coutinho—Augusto Luis Vieira Soares—Antonio Maria da Silva—Alfredo Rodrigues Gaspar—Frederico Antonio Ferreira de Simas—

MINISTRY OF THE COLONIES

GENERAL DIRECTION FOR THE COLONIES

Department 6.

MINISTERIAL DECREE NO. 595

To the Governors of the Provinces beyond the seas for their direction and convenience: By order of the Government of the Portuguese Republic it is communicated that the time set for the validity of the Royal Italian Decree, of May 2nd of the past year, in relation to the residence of foreigners in Italy has been abrogated until after the war, and referred to in the Ministerial Decree of the 9th of June, 1915, and published in the "Government Daily Record" No. 110, 1st Series, of the 11th of the same month and year.

Government House of the Portuguese Republic, February 24, 1916.—The Minister for the Colonies, ALFREDO RODRIGUES GASPAR.

MINISTRY OF PUBLIC INSTRUCTION

DEPARTMENT OF INSTRUCTION FOR UNIVERSITIES

DECREE No. 2:230

Having in consideration the dispositions in law No. 478, of January 29th, 1916, and in articles 33, No. 5, and 87 of the decree-law of April 19, 1911;

And exercising the powers conferred on me by No. 3 of article 47, of the Political Constitution of the Portuguese Republic:

It is hereby agreed by sanction of the Minister of Public Instruction, to decree the following:

Article 1. The Deans of the Universities of the Republic and School Councils of higher education, not affiliated to the Universities, shall be authorized to accept the absence excuses given by students in the respective theoretical courses and practical courses, when they deem that these absences are justified if determined by any doubtful motive or interpretation and application of the scholastic regulations.

Art. 2. This decree shall be enforced immediately.

Art. 3. It is agreed to revoke all dispositions to the contrary.

The Minister of Public Instruction has so agreed and has this executed. Government House of the

Republic, February 23rd, 1916.—BERNARDINO MACHADO—Frederico Antonio Ferreira da Simas.

(Signed by) W. Stanley Hollis, Consul General.
" Alvaro Augusto Nunes Ribeiro.

National Printery of Lisbon.

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SUMÁRIO

Presidência do Ministério:

Decreto n.º 5:563, determinando que os funcionários civis dos diversos quadros e serviços do Estado, que reúnam todas as condições precedentes para o acesso à classe imediata por antiguidade, só possam ser promovidos a que por motivo de se acharem ou terem estado no serviço de colónias forem inibidos de prestar as suas provas, sejam desde já considerados em igualdade de circunstâncias com os que, livres da vida militar, prestarem essas provas e sobre êstes sejam preferidos.

Ministério do Interior:

Para publicação, rectificado, do decreto n.º 5:555, inserto no *Diário do Govêrno* n.º 97, de 9 de Maio de 1919, que equipara os vencimentos e vencimento extraordinário do presidente e vogais efectivos do Supremo Tribunal Administrativo aos do presidente e juízes do Supremo Tribunal de Justiça.

Ministério da Justiça e dos Cultos:

Decreto n.º 5:554, inserindo várias disposições referentes a casas judiciais.

Decreto n.º 5:555, determinando os serviços a cargo do Ministério Público no Tribunal de Comércio de Lisboa.

Ministério da Marinha:

Decreto n.º 5:556, consentindo o quadro dos oficiais auxiliares da marinha com dois guardas-marinhas.

Ministério das Colónias:

Decreto n.º 5:557, determinando que no Ministério das Colónias e junto do Conselho Colonial funcione uma secretaria privativa denominada Secretaria do Conselho Colonial e regulando a sua constituição e funcionamento.

Ministério da Instrução Pública:

Decreto n.º 5:558, autorizando o Govêrno a contrair com a Caixa Geral de Depósitos um empréstimo de 300.000$ para aquisição de terrenos e construção de edifício para a Escola Superior de Farmácia de Lisboa e aquisição de material e mobiliário escolar.

Decreto n.º 5:559, autorizando o Govêrno a contrair com a Caixa Geral de Depósitos um empréstimo de 250.000$ destinado à construção de edifício da Escola Normal Primária de Lisboa.

Decreto n.º 5:560, concedendo uma gratificação e vencimento extraordinário aos professores das Faculdades de Medicina que regem cadeiras em clínicas cirúrgicas, gerais ou de especialidade, que estejam a seu cargo.

Para publicação, rectificado, do artigo 2.º do decreto n.º 5:491, inserto no *Diário do Govêrno*, que regulou a constituição do corpo docente das Faculdades de Letras das Universidades de Lisboa e de Coimbra.

Decreto n.º 5:561, autorizando a transferência para o orçamento do Ministério da Instrução Pública para o corrente ano económico da quantia de 4.800$, correspondente aos duodécimos de Abril a Junho de 1919 da dotação consignada para os serviços do Instituto de Música Colonial, inscrita no capítulo 4.º, artigo 49.º, do orçamento do mesmo Ministério para o ano económico de 1918-1919.

Decreto n.º 5:562, abrindo um crédito da quantia de 64 para reforço de diversas dotações da tabela da distribuição despesa do Ministério da Instrução Pública, autorizada ano económico de 1918-1919.

Decreto n.º 5:563, abrindo um crédito especial da quan 15.100$, destinado a ocorrer ao pagamento dos vencimen pessoal dos quadros das Escolas Móveis, ajudas de custo e pesas de transporte dos inspectores das mesmas escolas, d o ano económico de 1918-1919.

Ministério do Trabalho:

Portaria n.º 1:772, indeferindo os pedidos de concessão águas minerais feitos pela Empresa das Águas Minerais d gação, Limitada, e determinando que água no posto de Es nova nascente denominada Fonte do Pago para ser aprov pelo Conselho de Administração dos Bairros Operários.

Ministério dos Abastecimentos:

Decreto n.º 5:564, inserindo a reorganização dos Trans Marítimos.

Decreto n.º 5:565, estabelecendo que passem a ser fisc portaria, pelo Ministério dos Abastecimentos, os preços d vernos géneros de primeira necessidade.

Decreto n.º 5:566, suprimindo o sobretaxa de exporta $50 por quilograma de papel.

Decreto n.º 5:567, suspendendo as disposições do artig § único do artigo 11.º do decreto n.º 4:930, publicado n rio do Govêrno n.º 245, de 9 de Novembro de 1918, compan forem organizadas e publicadas novas tabelas de preços nos pelo Ministério dos Abastecimentos.

Portaria n.º 1:773, esclarecendo as dúvidas suscitadas interpretação do artigo n.º e seu § único do decreto n.º 5:4 blicado no *Diário do Govêrno* n.º 80, de 28 de Abril d que tornou livre o comércio e a trasfega de milho e os dos produtos de moagem dêstes cereais.

Rectificação ao decreto n.º 5:513, publicado no *Diário do verno* n.º 94, de 6 de Maio de 1919, que isenta várias pro cias atingentes a contribuir os interessados das colónias dos ras de elevação com os da indústria nacional.

Portaria n.º 1:774, designando os géneros que constam pendentes da Direcção Geral da Comércio e para serem exportados e reexportados para as colónias gerais.

Nota. — Foram publicados dois Suplementos ao *Diário do Govêrno* n.º 97, de 9 de Maio de 1919, contendo os seguintes diplomas:

1.º Suplemento

Ministério do Interior:

Decreto n.º 5:549, ordenando para o dia 1 de Junho de 1919 eleições de Senadores e Deputados pelo distrito de Portalegre, que se acharam fixadas para o dia 11 de Maio do mesmo ano.

Ministério da Instrução Pública:

Decreto n.º 5:550, fixando os quadros e vencimentos do pessoal não docente das Universidades de Coimbra, Lisboa e Porto e das suas respectivas Faculdades, Escolas e Institutos.

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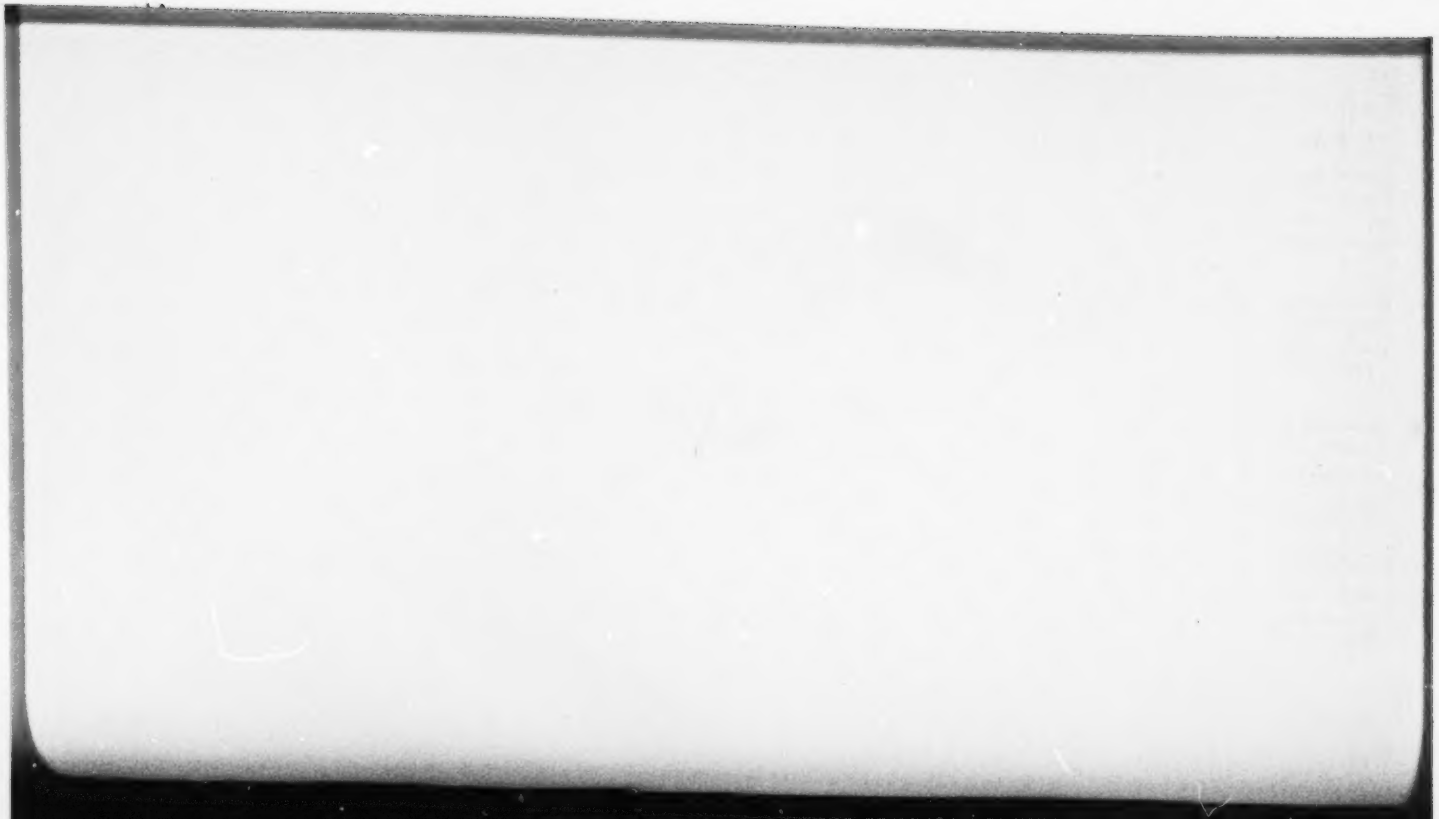


Considerando que os vencimentos dos vogais deste Tribunal não são equivalentes, nem iguais aos do Supremo Tribunal Administrativo a tabela de 23 de Fevereiro de 1895;

Considerando, que o concurso de despesa resultante do justo melhoria de vencimentos dos vogais, secretario geral e empregados do secretario do Supremo Tribunal Administrativo é compensado em grande parte pelos recursos ordinarios e pelas que passam a ser arrecadadas pelo Estado:

Decreta, por lei, o Governo da Republica Portuguesa, para valer como lei:

Artigo 1.º Os ordenados e vencimentos annuaes do presidente e vogais effectivos do Supremo Tribunal Administrativo são equiparados aos do presidente e juizes do Supremo Tribunal de Justiça, ficando aquelles magistrados com os direitos e obrigações delles.

§ unico. É egualmente prohibido o exercicio da advocacia ao agente do Ministerio Publico junto do Supremo Tribunal Administrativo.

Art. 2.º São extinctos os logares de vogais extraordinarios do Supremo Tribunal Administrativo.

Art. 3.º No impedimento por mais de trinta dias de qualquer dos vogais effectivos, poderá o Governo nomear para o substituir, sob proposta do Tribunal, um dos vogais, constituido por pessoas que satisfaçam aos requisitos do artigo 3.º do decreto de 29 de Julho de 1892.

§ unico. O substituto perceberá os vencimentos que lhe competirem.

Art. 4.º Os vencimentos do secretario geral, primeiros e segundos oficiaes, amanuenses, continuos e serventes do Supremo Tribunal Administrativo são equiparados aos do secretario geral, primeiros, segundos e terceiros officiaes, continuo e serventes do Ministerio do Interior.

Os emolumentos pertencentes a esses funccionarios começam a ser cobrados por conta do Estado.

Art. 5.º O presidente e funccionarios do Supremo Tribunal Administrativo ficam obrigados a publicar nos primeiros quinze dias de cada mez, no Diario do Governo, uma relação nominal de todos os empregados do mesmo Tribunal.

Art. 6.º Não é applicavel ao Supremo Tribunal Administrativo o disposto no decreto de 29 de Abril de 1892, ficando consequentemente em pleno vigor as disposições geraes do decreto de 29 de Fevereiro de 1892 ao qual não alteram, nem revogam.

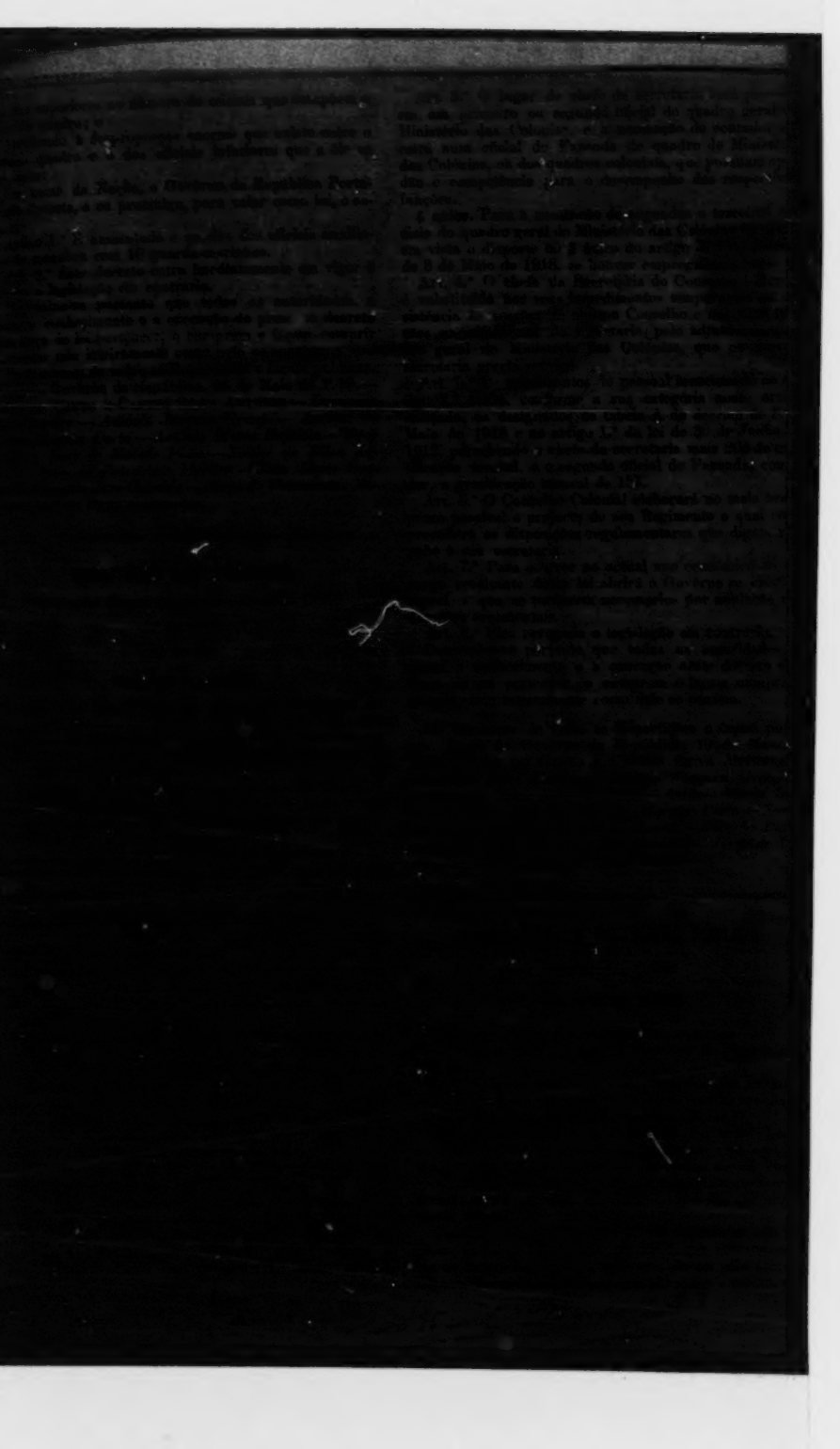
Art. 7.º São elevados ao dobro o preparo exigido no artigo 1.º das disposições geraes do decreto referido, de 29 de Fevereiro de 1892, e os emolumentos constantes da tabella approvada pelo mesmo decreto, dos artigos [illegible]

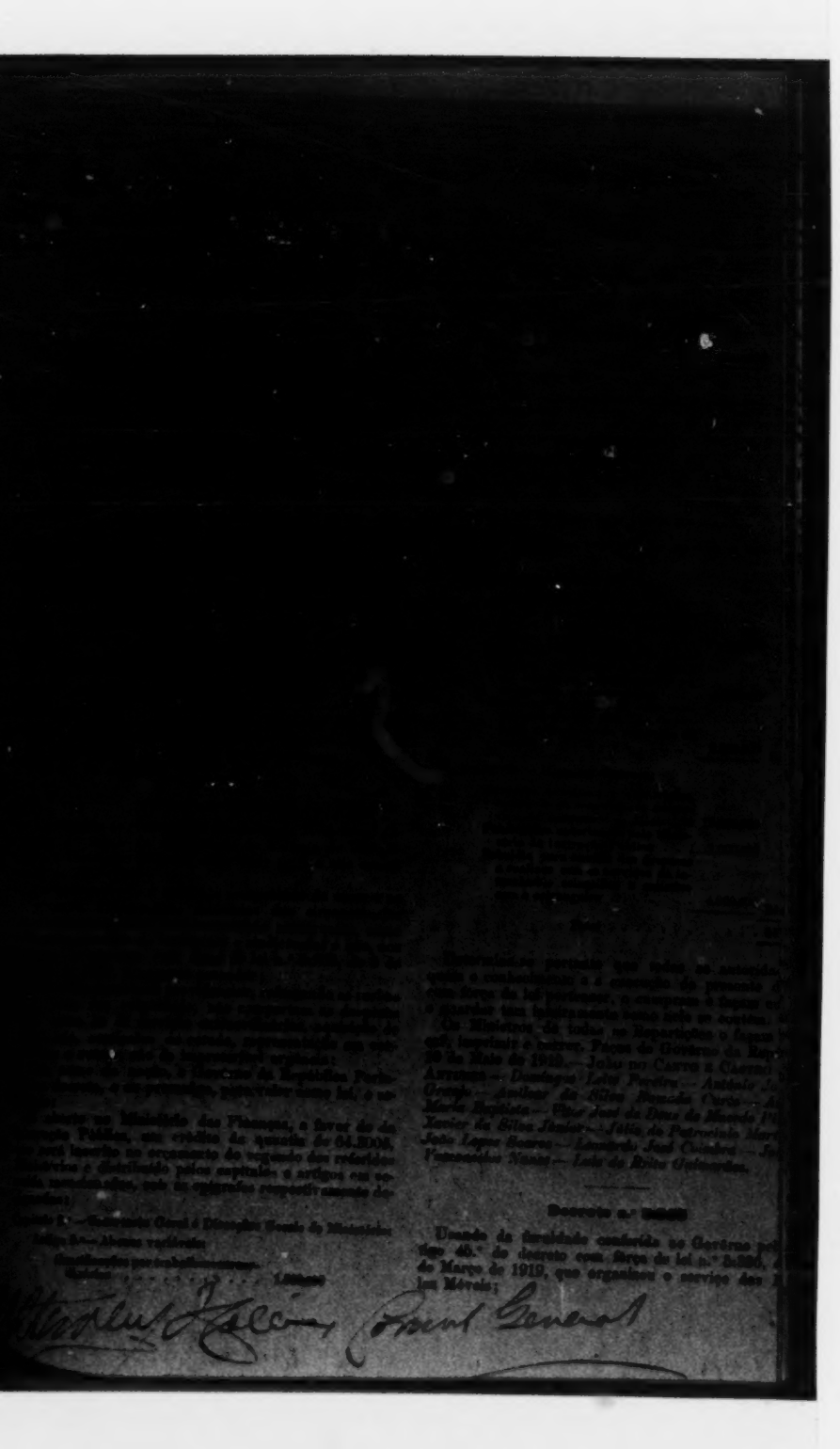
[illegible] Ministerio dos Negocios da Fazenda, o Presidente [illegible] para o mesmo fim.

[illegible] Tribunal.

[illegible] Tribunal.

[illegible] Tribunal





nacional, e a sua administração, sob o ponto de vista comercial, fica subordinada ao plano geral económico, estudado e executado pelo Conselho de Administração, ouvida a Junta Consultiva.

Assim, a Direcção dos Transportes Marítimos poderá mais fácilmente atender à técnica administrativa do grupo de navios do Estado, cujas directrizes são dadas pelo Conselho, e cuja administração técnica fica centralizada, de forma a que possa, pela sua homogeneidade e método, realizar o que lhe cumpre, como estação técnica, para a boa economia do Estado.

O Governo da República Portuguesa decreta, e eu promulgo, para valer como lei, o seguinte:

Artigo 1.º É criado o Conselho de Administração da Marinha Mercante Nacional, estação autónoma, técnica e administrativa, à qual compete:

1.º Regular e estudar as viagens e fretes dos navios mercantes nacionais de forma a coordenar os seus serviços em harmonia com os interêsses gerais do Estado, e aplicar à marinha mercante toda a legislação em vigor;

2.º Organizar todo o serviço de estatística, quer de viagens, quer de mercadorias, por qualidades e origens, de importação e exportação;

3.º Autorizar as viagens dos navios nacionais, fora das linhas de abastecimento, quando as circunstâncias o permitam;

4.º Organizar o serviço de construções navais, de forma a impulsionar o seu desenvolvimento e rapidez de construção;

5.º Administrar e dirigir os serviços dos transportes marítimos.

Art. 2.º O Conselho de Administração da Marinha Mercante é composto por um oficial do activo da marinha de guerra, presidente, e por quatro vogais nomeados pelo Governo, pelo Ministério dos Abastecimentos, entre pessoas de comprovada competência, cada um dos quais terá o mesmo vencimento mensal que os vogais da comissão executiva do Conselho de Administração dos Caminhos de Ferro do Estado, fixado na organização e regulamento dos Caminhos de Ferro do Estado, aprovado pelo decreto n.º 5:328, de 25 de Março de 1919.

§ único. As reuniões do Conselho de Administração da Marinha Mercante poderá assistir o director dos transportes marítimos.

Art. 3.º O Conselho de Administração da Marinha Mercante submete ao voto da Junta Consultiva os seguintes assuntos:

1.º As qualidades de carga a importar ou exportar, frete que devem pagar e percentagens de carregamento para ser comunicado às autoridades respectivas;

2.º As alterações às leis que regulam os diversos serviços da marinha mercante;

3.º As indicações necessárias para o maior rendimento dos portos nacionais que mais interessam ao desenvolvimento do país.

Art. 4.º A Junta Consultiva compõe-se:

1.º Do presidente, presidente do Conselho de Administração da Marinha Mercante;

2.º Do vice-presidente, delegado do Ministério dos Abastecimentos no Conselho de Administração da Marinha Mercante;

3.º De um delegado do Ministério do Comércio;

4.º De dois delegados do Ministério dos Abastecimentos, sendo um o secretário permanente da Junta, com o vencimento mensal de 150$;

5.º De um representante do comércio colonial;

6.º De um representante das Associações Comerciais;

7.º De um representante da Exploração do Pôrto de Lisboa;

8.º De um representante das Associações Industriais;

9.º Do chefe da Repartição de Navegação;

10.º Do director dos Transportes Marítimos.

Art. 5.º A Repartição de Navegação passa, desde data, à Direcção Geral dos Transportes Marítimos, como a Secção de Estatística, passam para o Conselho de Administração da Marinha Mercante o seu pessoal, o qual mantém todos os seus vencimentos que nesta data lhe são garantidos pelos despachos em vigor.

Art. 6.º Os vencimentos do presidente do Conselho de Administração da Marinha Mercante são os que nesta data para o extinto cargo de director dos Transportes Marítimos do Estado, fixados em despachos em vigor.

Art. 7.º Toda a legislação sôbre marinha mercante continua em vigor, sendo fiscalizada, executada e interpretada a sua execução pelo Conselho de Administração da Marinha Mercante.

Art. 8.º O Conselho de Administração do Ultramar deverá elaborar o regulamento para o seu funcionamento, sôbre o qual dará parecer a Junta Consultiva em harmonia com o disposto nesta lei.

Art. 9.º É extinta a Direcção Geral dos Transportes Marítimos do Estado e criada a Direcção dos Transportes Marítimos.

Art. 10.º Ao director dos Transportes Marítimos compete dirigir os serviços dos navios mercantes do Estado por forma que êste se mantenha no maior grau de eficiência comercial.

Art. 11.º O director dos Transportes Marítimos terá sob a sua direcção as seguintes secções:

a) Serviço de viagens, fretes, rateios, estatística, relações com o Conselho de Administração;

b) Inspecção de contabilidade;

c) Serviço de estiva, do pôrto de armamento e descarga;

d) Serviço de máquinas, sua manutenção, pessoal;

e) Serviço de oficinas, reparações gerais;

f) Serviço de agência em Lisboa;

g) Serviços de comissarindos;

h) Serviço de depósitos;

i) Serviço de reclamações;

j) Serviço de alfândega;

l) Serviço de pessoal;

m) Serviço dos navios fretados ao Governo;

n) Serviço de carvão;

o) Serviço de saúde;

p) Serviço de depósitos de carvão e sobressalentes.

§ único. O serviço especificado na alínea *m*) é serviço colonial e serviço para o estrangeiro.

Art. 12.º O director dos Transportes Marítimos, pessoa de reconhecida competência, pára o seu vencimento é o que está estabelecido para o cargo de director geral dos Transportes Marítimos.

Art. 13.º [illegible] o pessoal é proposto pelo Conselho de Administração da Marinha Mercante e nomeado pelos ministros, devendo o chefe de secção dos serviços ser um oficial de marinha de guerra ou mercante.

§ único. O restante pessoal necessário para as secções das diferentes secções, findo no primeiro movimento, será contratado e o que actualmente presta serviços na extinta Direcção Geral dos Transportes Marítimos do Estado transita para a Direcção dos Transportes Marítimos, desempenhando os mesmos lugares com todos os vencimentos que lhe são garantidos pelos despachos e leis em vigor nesta data, dispensando a sua nomeação pelo Director dos Transportes Marítimos.

Art. 14.º O Director dos Transportes Marítimos terá o Conselho Superior da Marinha Mercante ao seu movimento comercial de navios

Direcção Geral do Comércio [illegible]

Portaria n.º 4:778

Convindo simplificar e não dificultar o comércio [illegible] colónias portuguesas sempre que as circunstâncias [illegible] temas o permitam, e reconhecendo-se que muitos [illegible] dutos podem já ser exportados livremente:

O Governo da República Portuguesa, pelo Min[illegible] Abastecimentos, manda observar o seguinte:

Continua dependente de licença da Direcção G[illegible] Comércio Externo até determinação em contrário [illegible] portação e a reexportação para as colónias port[illegible] do seguinte:

Animais vivos;
Carnes de todas as qualidades e de q[illegible] modo preparadas;
Banha de porco e toucinho;
Cereais e suas farinhas;
Leguminosas;
Arroz;
Batatas;
Cebolas;
Ovos.

Todos os demais produtos podem ser exporta[illegible] reexportados para as colónias portuguesas indepe[illegible] mente de autorização superior, enquanto as co[illegible] ecessidades internas não aconselharem o contrário.

Paços do Governo da República, 10 de Maio de 1[illegible]
O Ministro dos Abastecimentos, *Luís de Brito Gui[illegible]*

IMPRENSA NACIONAL DE LISBOA

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Toda a correspondência, que diga respeito a este jornal, deve ser dirigida à Administração do Diário do Governo, e a publicação de anúncios, avisos ou declarações, nas condições estabelecidas, deve ser requisitada na Imprensa Nacional, bem como as provas que se julgarem necessárias.

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PRESIDÊNCIA DO MINISTÉRIO

Decreto n.º 2:220

(Publicado em suplemento ao *Diário* n.º 34, de 17 de Fevereiro)

Considerando que interessam de economia nacional, no que respeita aos meios de transportes marítimos, que cada vez se tornam mais difíceis e dispendiosos, sendo um dos motivos desta dificuldade a falta de navios que fiquem em serviço;

Considerando que é urgente e urgentíssimo assunto se prenda directamente com o actual problema das subsistências, que é de salvação pública e por isso reclama instantemente medidas urgentes e adequadas às importunas necessidades do país;

Atendendo ao disposto na base 10.ª da lei n.º 480, de 7 de Fevereiro de 1916:

Hei por bem, de harmonia com esta lei e sob proposta do Governo, decretar o seguinte:

Artigo 1.º As requisições de meios de transportes marítimos, autorizadas pela lei n.º 480, de 7 de Fevereiro de 1916, serão feitas por ordem do Ministro da Marinha, por sua delegação, pela autoridade marítima, no local onde o navio se encontre.

§ 1.º Se o navio estiver em porto colonial, a requisição ou delegação a que se refere êste artigo será dada por ordem do Ministro das Colónias.

§ 2.º Nos casos de urgente necessidade, as requisições poderão ser feitas por iniciativa da autoridade, em nome do respectivo Ministro.

Art. 2.º As requisições serão notificadas por escrito, por ordem ou em nome de quem as fizer, ao capitão ou encarregado do navio ou ao proprietário ou armador, e, na falta dêstes, a quem os represente, e executar-se-hão imediatamente.

§ único. O escrito de notificação exarar-se-há em [illegible] exemplares, sendo um entregue ao notificado e lavrando-se no outro a certidão da entrega dessa notificação, assinada pelo notificado ou, quando êste não possa ou não queira assinar, por duas testemunhas, cujos nomes, profissões e moradas se devem indicar no seu contexto.

Art. 3.º Feita a requisição, proceder-se-ha, logo que seja possível, ao inventário da carga e mais objectos que se não considerem pertenças do navio.

§ 1.º A este inventário assistirão a autoridade marítima e o cônsul da nação a que o navio pertencer, ou seu delegado, e por ambos será assinado em dois exemplares, sendo um destinado à comissão a que se refere o artigo 5.º e o outro remetido ao Consulado.

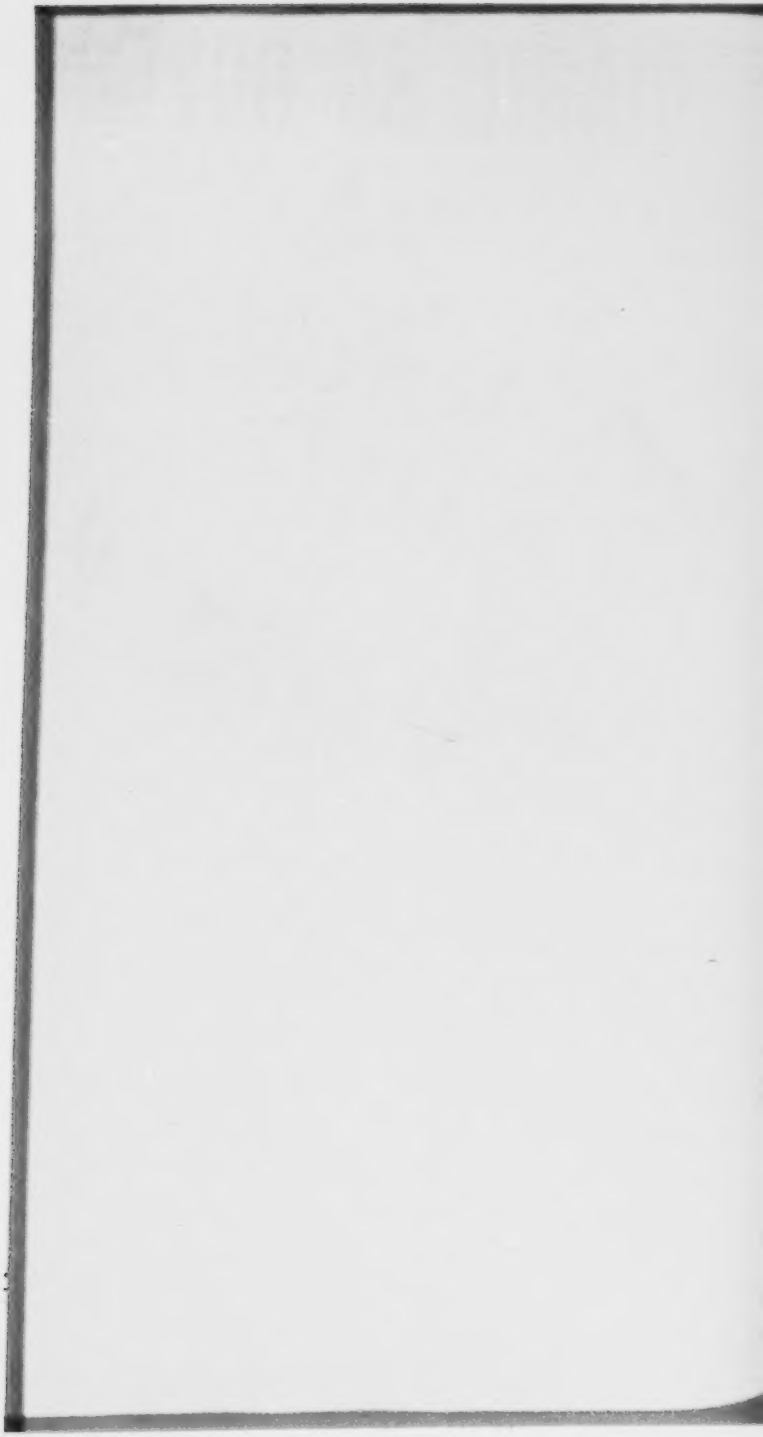
§ 2.º No caso da autoridade consular, ou seus delegados, não assistirem ao inventário, tendo sido devidamente avisados, ou não os havendo na localidade, a autoridade marítima procederá ao mesmo inventário, na presença de duas testemunhas, que com ela o assinarão.

§ 3.º A carga e mais objectos a que se refere êste artigo deverão ser descarregados e transportados, por conta e risco dos proprietários, em Lisboa para os armazéns da alfandega ou do porto desta cidade, e nos restantes portos de metrópole e colónias para onde fôr determinado pela competente autoridade aduaneira.

Art. 4.º As requisições feitas nos termos do artigo [illegible] nos seus parágrafos serão sempre confirmadas por decreto [illegible] os navios considerados portugueses.

Art. 5.º É criada, junto do Ministério da Marinha uma comissão, que terá por fim:

1.º Promover a avaliação do navio e de todos os [illegible] pertences;



...pago pelo ...

... Determinar a indemnização devida por avarias ou qualquer deterioração, que não derive do uso a que ...

... Determinar a indemnização, por qualquer inutilização ou ...

... Resolver sobre tudo que diga respeito à alimentação ...

... Propor a nomeação ou demissão do pessoal ...

1.º A retribuição mencionada no n.º 2.º Equidará mensalmente e será logo depositada na Caixa ... Depósitos, devendo do mesmo modo depositar as quantias correspondentes às indemnizações a ... referem os n.ºs 3.º e 4.º

2.º As quantias depositadas nos termos do parágrafo ... podem ser levantadas por quem de direito, desde ... da restituição do navio.

Art. 5.º A comissão a que se refere o artigo anterior ... nomeada pelo Ministro da Marinha, e compor-se há: ... capitão de mar e guerra, que será o presidente; ... engenheiro construtor naval;

... ajudante do Procurador Geral da República;

... representante das emprêsas de navegação;

... representante da Associação Comercial de Lisboa;

... representante das companhias de seguros;

... delegado do Ministério das Finanças.

§ único. Das decisões desta comissão haverá recurso ... Ministro da Marinha, que decidirá em última instância.

Art. 6.º A restituição do navio deve ser notificada ao ... ou ao seu representante com a antecipação ... dias, pelo menos, e, salvo acôrdo em contrário, ... lá, sempre que seja possível, na pôrto em ... efectuou a requisição.

§ 1.º Para os efeitos a que se refere êste artigo o ... do navio, ou o seu representante, deverá ... residir a que se refere o artigo 5.º, com excepção, ... pessoa, residente em Portugal, a quem deva ... a notificação.

§ 2.º Na falta de indicação mencionada no parágrafo ... ou quando a entrega se não possa efectuar por ... do proprietário ou seu representante, o navio, ... da medida por pessoa, será pôsto em hasta pública ... devidamente anunciada, depositando-se na Caixa ... Depósitos, à ordem de quem tiver direito, o ... da arrematação, depois de deduzidas todas as ... que para isso se julgue feito, bem como ... indemnizatório, se também feito desde que a ... não realizasse por falta da citada indicação.

Art. 7.º Fica derrogada a legislação em contrário.

Ministros de todas as Repartições assim o tenham ... e façam executar. Paços do Govêrno da República, 23 de Fevereiro de 1916. — *Bernardino Machado* — *Afonso Costa* — *Artur R. de Almeida Ribeiro* — *João de Menezes* — *José Mendes Ribeiro Norton de Matos* — *Pedro Virgo de Azevedo Coutinho* — *António Maria da Silva* — *Augusto Luís Vieira Soares* — *Alfredo Ernesto Ladeira Gaspar* — *Frederico António Ferreira de Simas*.

MINISTÉRIO DA GUERRA

Repartição do Gabinete

Decreto n.º 2:381

... necessário modificar algumas das disposições ... decretos de 25 de Agosto de 1913 e de 5 de ... de seu próximo findo, que introduziram várias ... no plano de uniformes para o exército: hei por ... sob proposta do Ministro da Guerra, decretar que:

... oficiais do quadro de artilharia de campanha, ... dos com o antigo curso da Escola do Exército, ... galas das essenas e das dalmáticas o emblema da ... de plano de uniformes publicado na Ordem do Exército n.º 10, 1.ª série, de 1911; e que os emblemas usados ... oficiais dos grupos de metralhadoras a que se refere ... alínea g) do artigo 19.º das alterações ao plano de ... fardamento, aprovadas por decreto de 20 de Agosto de ... sejam substituídos pelos emblemas da fig. 9 das ... mas alterações, da prata, com as mesmas dimensões ... tendo superiormente o número do grupo.

O Ministro da Guerra assim o tenha entendido e ... executar. Paços do Govêrno da República, 24 de ... vereiro de 1916. — *Bernardino Machado* — *José ... Ribeiro Norton de Matos*.

1.ª Direcção Geral

2.ª Repartição

Decreto n.º 2:382

Tendo a Câmara dos Deputados, em sua sessão ... de Janeiro do corrente ano, julgado ser de inadiável ... sidade que, além do cumprimento dado ao preceituado ... artigo 405.º do decreto com fôrça de lei de 25 de ... de 1911, se efectivasse, a êste respeito, o estabelecido ... no artigo 428.º do mesmo decreto; usando da faculdade ... que me confere o n.º 3.º do artigo 47.º da Constituição Política da República Portuguesa, hei por bem, sob proposta do Ministro da Guerra, decretar o seguinte:

Artigo 1.º É mantida a separação dos quadros de oficiais de artilharia a pé e de artilharia de campanha, ... em virtude do determinado no decreto de 11 de Setembro de 1915 e conformes o disposto no artigo 405.º ... decreto com fôrça de lei de 25 de Maio de 1911.

Art. 2.º A promoção dos oficiais de cada um dos ... dros a que se refere o artigo 1.º passa a ser feita ... tre dos mesmos quadros, nos termos do artigo 428.º citado decreto com fôrça de lei de 25 de Maio de 1911.

Art. 3.º Ficam revogadas as disposições em contrário.

O Ministro da Guerra assim o tenha entendido e ... executar. Paços do Govêrno da República, 24 de ... reiro de 1916. — *Bernardino Machado* — *José Mendes ... Ribeiro Norton de Matos*.

4.ª Repartição

Decreto n.º 2:383

Considerando que as obras, de execução já ... adiantada, para transformação e larga ampliação ... reira do tiro da Pedrouços, dentro em breve ... mentar notàvelmente o rendimento da mesma carreira, que a isto tem necessàriamente de corresponder ... mento no pessoal encarregado dali ministrar a instrução prática do tiro, não só às tropas encorporadas como ... bém aos indivíduos da classe civil;

Atendendo a que a dita instrução vem sumamente ... diferenciada em virtude da actual organização ...

Considerando que o quadro do pessoal permanente ... desta carreira tem sido por vezes ampliado, e, ... mesmo, não pode satisfazer às necessidades sempre ... crescentes do serviço da mesma carreira;

Considerando que convém fixar definitivamente o ... tivo do referido pessoal;

Hei por bem, sob proposta do Ministro da Guerra, ... usando da faculdade que me confere o n.º 4.º do artigo ... da Constituição Política da República Portuguesa, ... ter que o quadro do pessoal permanente da carreira ... tiro da guarnição de Lisboa tenha a composição seguinte:

1 director, oficial superior de infantaria.
1 sub-director, capitão de infantaria.
4 instrutores, tenentes de infantaria.
2 segundos ajudantes (que serão considerados ...

[illegible] uma sociedade a que pertenceram); 5 primeiros [illegible] 12 soldados, todos de infantaria.

O Ministro da Guerra assim o tenha entendido e faça executar. Paços do Governo da República, 24 de Fevereiro de 1913. — *Bernardino Machado* — *José Mendes Ribeiro Norton de Matos*.

Decreto n.º 2:684

Tendo-se reconhecido necessidade e regulamentar o decreto n.º 2:486, aprovado por decreto de 27 de Novembro de 1912; hei por bem, usando da faculdade que me confere o n.º 2.º do artigo 47.º da Constituição Política da República Portuguesa, decretar que seja aprovado o mencionado por um exemplar o regulamento do tiro nacional que a este se acompanha.

Os Ministros da Guerra e do Fomento assim o tenham entendido e façam executar. Paços do Governo da República, 24 de Fevereiro de 1913. — *Bernardino Machado* — *José Mendes Ribeiro Norton de Matos* — *António Luiz de Sousa*.

Regulamento do Tiro Nacional

I — Generalidades

1. O Tiro Nacional é a instituição destinada a desenvolver [illegible] pelas sociedades de tiro ao alvo com armas de guerra e a ministrar todos os conhecimentos teóricos relativos [illegible] portuguesas.

2. A direcção, fiscalização e superintendência de todo o serviço do Tiro Nacional pertence à 4.ª Repartição da 1.ª Direcção do Ministério da Guerra, e exercem-se por intermédio das respectivas Inspecções de Infantaria.

II — Sociedades de Tiro

3. É permitida a criação de Sociedades de Tiro em todo o território da República.

4. Reconhecem-se por Sociedades de Tiro todo o agrupamento, [illegible] organizações, que, tendo por fim fomentar a instrução e prática de tiro, preparando cidadãos para bem [illegible] e aos deveres militares, procure [illegible] desenvolver o patriotismo, por todos os meios, o amor pela [illegible] o brio individual e moral do país.

5. Estas sociedades serão constituídas tanto por indivíduos do sexo civil como do militar, tendo todos iguais direitos e deveres.

6. Poderão [illegible] as Sociedades de Tiro, com o mesmo fim, [illegible] Associações de educação física pela ginástica, pelo esgrima, pelo manejo de armas e pelos exercícios militares.

7. As sociedades serão designadas por:

Sociedade de Tiro n.º ... de ... (nome da localidade),

ou [illegible] pessoais e uso de qualquer outro subterfúgio.

8. As sociedades ou grupos anteriormente existentes à [illegible] que, como sub-fins, se [illegible] designação sob a [illegible] seguinte: S. T. n.º ... de ... [illegible] F.

9. As Sociedades de Tiro funcionarão sempre junto [illegible] carreira de tiro.

1.º Quando em qualquer localidade não haja carreira de tiro, a Sociedade de Tiro que pretenda organizar-se [illegible] constituir-se lá com os respectivos corpos administrativos, com a Sociedade de Instrução Militar Preparatória, se ali existir, e com outras colectividades, a fim de levarem a efeito a construção da necessária carreira;

2.º O Ministério da Guerra concorrerá para a construção destas [illegible] carreiras em cada concelho, com a cota [illegible] do respectivo [illegible] regulamental, o bom [illegible] assim ocorrerá sempre um oficial para o [illegible] construção.

7. Estas sociedades constituirão [illegible] poderão formar-se, ou funcionar, com menos [illegible] viduos nas condições, 30 nas sedes de concelho [illegible] capitais de distritos.

8. As Sociedades de Tiro poderão ter um [illegible] todos os sócios.

9. A 1.ª escola das Sociedades de Tiro é [illegible] pelos mancebos desde a idade mínima até [illegible] que completem 16 anos, devendo ser-lhes [illegible] ministrada a instrução preliminar e a prática [illegible] dentro, e a preparação física dos sócios que a [illegible] A 2.ª escola é constituída por todos os indivíduos de 17 anos, completando a sua instrução com [illegible] elementos e práticas do tiro de guerra.

10. As Sociedades de Instrução Militar Pr[illegible] já existentes, ou que venham a criar-se, e [illegible] sendo consideradas Sociedades de Tiro para os [illegible] poderão dentro regulamento, é permitida a forma[illegible] escola a que se refere o n.º 9, procedendo [illegible] Ministério da Guerra.

a) Estas sociedades ficam isentas da capitação [illegible] refere o n.º 27.

11. As sociedades de desporto e outras [illegible] permitido criarem, agregadas a si, as duas escolas [illegible] sidades de Tiro nos termos do n.º 9, [illegible] modificação das suas cláusulas à aprovação do [illegible] da Guerra, ficando sujeitas a todas as disposições regulamentares.

12. As colónias Civis da União dos Atiradores Portugueses, e outras associações de tiro existentes, devendo, dentro do prazo de 6 meses a contar da publicação deste regulamento, [illegible] termos, nos termos deste regulamento, e [illegible] aprovação superior.

13. As Sociedades de Tiro serão dissolvidas:

a) quando tenham menos do número de sócios a que refere o n.º 7;

b) quando se afastem de qualquer forma dos fins que foram criadas ou se dediquem a assuntos de política ou religiosos;

c) quando, por qualquer acto ou manifestação, [illegible] dissolubilidade social e militar.

d) Quando não cumpram integralmente o fim [illegible] Ancionam, e sempre que se verifique que o [illegible] número é deficiente para o número de associados que [illegible] receber instrução.

Nos três últimos casos a Inspecção de Infantaria [illegible] respectivo processo, que [illegible] ao Ministro da Guerra para resolução definitiva.

14. As Sociedades de Tiro e outras que [illegible] a organizar-se ou modificar-se nos termos deste [illegible] mento, existentes no mesmo distrito administrativo, [illegible] constituir uma *Federação Distrital*.

a) As sociedades federadas, em caso algum, [illegible] a sua autonomia administrativa.

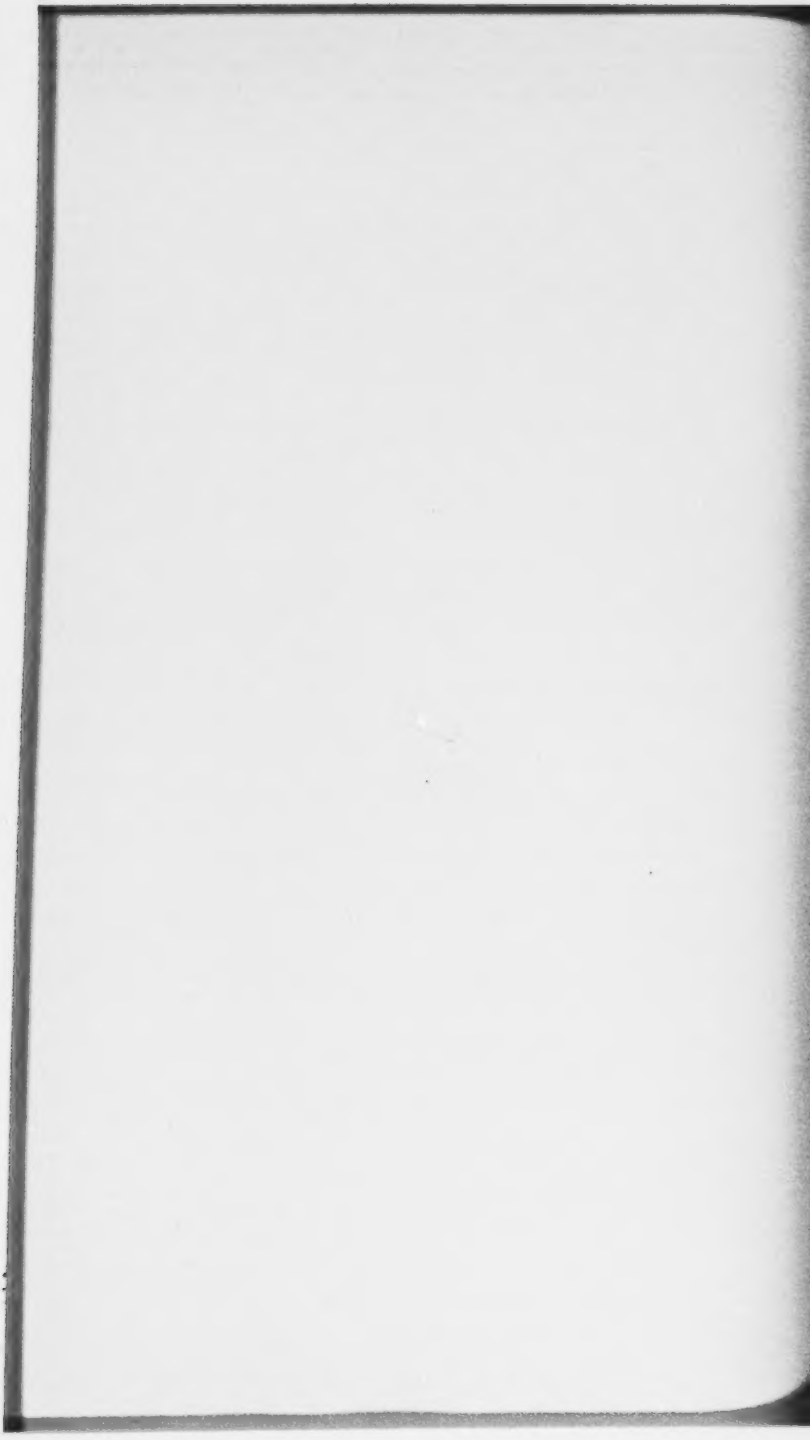
15. As Federações Distritais, que funcionarão [illegible] das carreiras de tiro da capital do distrito, [illegible] rigidas por uma comissão composta pelo oficial [illegible] regado da Instrução Militar Preparatória (com r[illegible] na sede do distrito), pelo director da carreira [illegible] por tantos vogais quantas sejam as sociedades fe[illegible]

a) O presidente será o oficial mais graduado [illegible] tigo de que trata este artigo;

b) A representação federal, que é obrigatória [illegible] fazer-se directamente por um dos seus associados [illegible] por delegação em qualquer sócio da Sociedade [illegible] capital do distrito;

c) Em caso algum será permitido que no mesmo [illegible] dão recaia mais de uma representação.

16. As Federações Distritais não carecem [illegible]



[illegible] especial e, particularmente, cuidar [illegible] auxílio das sociedades federadas e do aperfeiçoamento e uniformidade da instrução, tanto como [illegible] especiais;

g) Tratar, junto das autoridades militares e civis, de tudo quanto diga respeito às sociedades federadas;

h) Propor pelo desenvolvimento da prática do tiro e das sociedades, propondo superiormente quanto for julgado útil para tal fim;

i) Organizar os concursos regionais;

j) Dar cumprimento às ordens ou instruções da respectiva Inspecção do Infantaria em tudo quanto diga respeito ao fim especial a que se destinam;

l) Enviar anualmente à Inspecção de Infantaria da área um relatório circunstanciado, acompanhado de mapas estatísticos, onde se dê conta do movimento associativo, dos progressos da instrução ministrada, programa dos trabalhos assim efectuados e dos a efectuar no seguinte, resultado dos concursos anuais, etc.

17. Todas as sociedades federadas são obrigadas a pertencer para a federação distrital com uma cota anual, pago efectivamente e considerado vencido no 1.º de Janeiro, igual a 15 por cento das cotas dos seus sócios.

18. A sociedade federada que, dentro de 30 dias, não satisfaça a sua cota, ser-lhe há aplicável o disposto no n.º 25.

19. As federações serão designadas por: *Federação dos Sociedades de Tiro*, no distrito de ... (nome do distrito).

Federação do Tiro Nacional Português

20. As Federações Distritais e as sociedades não federadas constituem a *Federação do Tiro Nacional Português*.

21. A Federação do Tiro Nacional Português terá a sua sede em Lisboa e funcionará em casa própria.

22. A Federação do Tiro Nacional Português é a associação das representantes das federações distritais e sociedades não federadas e será composta por um delegado de cada federação, um por cada uma das sociedades federadas e um por cada sociedade não federada.

a) A representação, que é obrigatória, deverá ter lugar nos termos do alínea *b*) do n.º 15.

23. Cada delegado poderá representar mais de uma sociedade, e as resoluções da assembleia são válidas quando tomadas pela maioria dos delegados presentes, por intermédio dos quais o mais um dos representantes na convocação, e qualquer número se 2.º, não sendo contado por dois sócios os membros constantes de vários [illegible], o fundo, contado, com direito a voto, quando [illegible].

24. As sociedades não federadas distritalmente contribuirão à Federação Nacional uma pequena da sua sociedade, [illegible] pelos seus directores, e conjuntamente um exemplar dos seus estatutos aprovados e a lista dos seus sócios.

a) Estas sociedades são também obrigadas à apresentação do relatório a que se refere a alínea *e*) do número 16.º, o qual será enviado directamente à Inspecção de Infantaria correspondente.

25. Logo que a proposta seja recebida, a Federação Nacional enviará esta por cópia à federação distrital correspondente, e não havendo impugnação dentro de 30 dias, procederá à admissão.

a) Tendo a impugnação será devidamente fundamentada.

b) Se houver impugnação, a proposta será submetida a votação definitiva para ser resolvida.

26. As federações e as sociedades não federadas contribuirão para a Federação do Tiro Nacional Português com uma cota anual, paga [illegible] igual a 5 por cento e 20 por cento, respectivamente, da sua colecção [illegible]. As de distrito mobilizador pagarão de acordo do n.º 11 [illegible] 20 por cento da totalidade das cotas dos seus sócios que façam parte das duas praças.

28. Esta cota [illegible] no trimestre de Janeiro de cada ano.

29. A federação distrital ou sociedade não federada que, dentro de 30 dias, não pagar a sua cota [illegible] da Federação do Tiro Nacional Português [illegible] solvida; e só terá readmitida mediante votação e [illegible] com pagamento de todo o seu débito à data da [illegible] não a com mais uma multa equivalente a dois anos d[illegible].

30. Além dos representantes das sociedades [illegible] membros da Federação do Tiro Nacional Português:

a) Um presidente, nomeado pelo Ministério da [illegible] em cada triénio;

b) O chefe da 4.ª Repartição do 1.º Direcção da Secretaria da Guerra;

c) O chefe da secção da mesma repartição a cuja [illegible] estiver a instrução e prática do tiro;

d) Os directores das carreiras de tiro de Lisboa.

31. A assembleia da Federação do Tiro Nacional [illegible] funcionará na época em que se realizar o [illegible] nacional e pelo tempo necessário e compete-lhe:

a) Eleição dos corpos gerentes;

b) Eleição dos membros efectivos da comissão [illegible];

c) Eleição da comissão de propaganda;

d) Eleição da comissão executiva;

e) Aprovação de contas da gerência anterior;

f) Apreciação e discussão de propostas e alvitres [illegible] interesse geral;

g) Organização e discussão do programa do [illegible] nacional, quando êste não seja promovido pelo Ministério da Guerra, e outros, os quais deverão estar [illegible] entregues superiormente até 31 de Março.

32. A comissão técnica compor-se-há dos indivíduos de que tratam as alíneas *c*) e *d*) do número 30.º, presidindo-lhe o chefe da 4.ª Repartição da Direcção da Guerra, e de 5, vogais efectivos.

33. A comissão de propaganda compor-se-há de [illegible] livres também efectivos.

34. A comissão executiva compor-se-há de [illegible] efectivos, vice-presidente, tesoureiro, dois secretários e [illegible] vogais efectivos e dois substitutos, e administrará [illegible] Nacional.

35. A assembleia da Federação do Tiro Nacional [illegible] poderá reunir extraordinàriamente:

a) Quando convocada pelos corpos gerentes;

b) Quando a sua convocação for solicitada por [illegible] pelo menos, das sociedades; devendo, para a [illegible] funcionar neste caso, estarem presentes dois terços [illegible] signatários do pedido da convocação;

c) Por ordem do Ministério da Guerra, que, [illegible] pagará o transporte em caminho de ferro aos [illegible] ida e regresso.

36. Além das vantagens concedidas pelo Ministério [illegible] o Estado concederá aos membros das sociedades federadas e por intermédio destas, o abatimento de 20 por cento [illegible] preço das cartuchos que consumam nas sociedades [illegible].

37. A Federação do Tiro Nacional Português [illegible] particularmente em vista:

a) Auxiliar o estabelecimento de carreiras onde [illegible] não as houver, local apropriado, procurando para [illegible] fim obter a cooperação pecuniária das povoações [illegible] ditadas interessadas;

b) Concorrer para o máximo explendor dos concursos, já pela inscrição dos associados, já pela [illegible] prémios;

c) Promover festas de tiro especiais, torneios [illegible] pecuniários, ou entre os seus sócios exclusivamente, ou [illegible] admissão de atiradores estranhos, quando o julgue [illegible], e sempre que os respectivos programas [illegible] oficialmente aprovados, instituindo prémios e [illegible] distintivos;

d) Promover que nos concursos nacionais e [illegible] não se façam representar todas as sociedades [illegible]

...em conferencias publicas, em jornais e outras ...publicações, cartazes e postais ilustrados, e por todos os ...meios legais que julgue convenientes e eficazes, de modo ...a conseguir que ela constitua uma distracção entusiastica ...para portuguêsa;

f) Procurar manter relações, com todas as associações ...congeneres estrangeiras, quer por correspondencia directa, ...quer por intermedio da publicação sua;

g) Organizar a estatistica dos atiradores premiados nas ...provas, campeonatos e concursos locais e regionais.

III — Instrução de tiro

33. O periodo de instrucção de tiro ao alvo vai de 1 de ...Março a 31 de Outubro para todas carreiras, excepto para ...as de Lisboa e Pôrto, que funcionam permanentemente.

34. Os exercicios de tiro ao alvo realisar-se hão:

a) Em Lisboa e Pôrto, durante todo o ano e em todos os dias fora das horas destinadas á instrucção das tropas;

b) Em todas as outras localidades, nos domingos e dias ...de descanso semanal, podendo ainda, quando a respectiva ...repartição de Infantaria assim o entender, realisar-se em ...qualquer outros dias da semana.

35. Os exercicios de tiro ao alvo comprendem:

a) Tiro de tabela, como é estabelecido pelo regulamento de tiro de infanteria;

b) Sessões livres de tiro, com qualquer arma portátil, ...adoptada pelas, julgado em boas condições pelo director ...da carreira.

Prática do tiro

36. A instrucção de tiro será ministrada sempre de harmonia com os preceitos estabelecidos no regulamento de tiro de infanteria.

37. Em regra, o ensino dos exercicios preliminares ...terá lugar nas quartéis, sedes das Sociedades de Tiro, e ...nos estabelecimentos de ensino, quer oficiais quer particulares.

38. *Saber apontar a arma e disparar são condições ...absolutamente indispensaveis a um regular atirador, e só ...os tais exercicios deve incidir uma particular atenção do ...instrutor.*

39. Todos os militares encorporados e presentes no ...activo das unidades podem exercitar-se nas sessões livres de tiro, mas pagando sempre as munições pelos preços estabelecidos, com 25 por cento de abatimento.

IV — Matrículas dos atiradores; escrituração de tiro e registos

Bilhete de identidade

40. A matricula nas carreiras é permitida a todos os portugueses de nascimento ou naturalisados, desde o ano ...em que completem 17 anos; os menores de 12 aos 17 anos ...as senhoras podem tambem exercitar-se com armas de ...pequeno calibre e de qualquer sistema, não sendo para isso ...obrigados a abrir matriculas nos termos deste regulamento.

41. Aos estrangeiros maiores de 21 anos, residentes ...em Portugal, é permitida a prática do tiro em *sessões livres*, precedendo autorisação requerida ao Ministerio da ...Guerra.

42. Em cada carreira os atiradores serão inscritos num ...livro de matricula formado de fôlhas volantes, devendo ...escrever-se com a maior fidelidade todos os seus direitos.

43. Aos atiradores abrir-se-hão matricula numa das ...seguintes:

Série A — Tropas territoriais, não tendo servido no activo.

Série B — Individuos da classe civil.

44. Em cada carreira os atiradores constituirão duas ...secções particulares; a 1.ª secção, todos os que para ela ...tirarem a sua matricula.

a) Os atiradores da 1.ª secção serão numerados ...successivamente, dentro de cada série, segundo a ordem ...gica da sua matricula;

b) Os atiradores da 2.ª secção conservarão os ...que tinham na primeira carreira em que obtiveram ...matricula.

45. Aos militares, qualquer que seja o corpo de ...exercito a que pertençam, é proibido abrir matricula ...nos têrmos deste regulamento, limitando-se á prática ...sões livres de tiro e ás que pelo regulamento de ...infanteria forem estabelecidas.

46. As direcções das Sociedades de Tiro participarão ...sempre, aos directores das carreiras em cujos ...cionem, o movimento dos atiradores inscritos que ...seus associados, de modo a habilitarem os mesmos ...res a conhecer, em qualquer occasião, o estado ...mento associativo, e para que as mesmas sociedades ...sem auferir as vantagens concedidas pelo n.º 36.

a) Esta obrigação é tambem applicavel ás ...não federadas, embora não possam participar do ...beneficio.

47. Na escrituração dos resultados do tiro seguir-se-ha em tudo a norma que o regulamento de tiro de infanteria estabelece, ou venha a estabelecer, para a instrucção de tropas.

48. As Sociedades de Tiro e os directores das ...de instrucção militar preparatoria, de accôrdo com ...receberem das carreiras, organizarão primeiras individuaes (base de toda a escrituração), medalhas n.ºs 2, 3, ...para registar os resultados das sessões de tiro dos ...dores da série A.

49. As mesmas individuaes, rubricadas dentro de ...pa, medalha n.º 6, constituirão os processos individuaes ...atiradores, os quais, juntos em um ou mais maços ...competente indice, formarão o arquivo das carreiras ...gisto de Tiro Nacional.

50. Completadas as séries da progressão estabelecida, isto é, completa a escrituração das mesmas, ...duplicadas, devidamente authenticadas pelo director ...pectiva carreira, serão enviadas aos presidentes das ...ciedades de Tiro, podendo ser entregues pessoalmente ...aos não filiados, mediante recibo.

50. Os resultados do tiro serão sempre transcriptos para a caderneta da Sociedade pelo pessoal das carreiras.

51. Quando por mudança de residencia algum atirador deseje transferir a matricula para outra carreira, deverá receber desta requisitará ao daquella cópia authentica do respectivo processo individual e fôlha de matricula, que ali continuar a escrituração.

52. Aos atiradores transferidos nos têrmos do numero anterior é aberta matricula nas novas carreiras na 2.ª secção, mas sem outro número de ordem além do que tiver na série a que pertencerem na carreira donde vierem.

53. Além dos processos individuaes e de um registo geral de freqüência, haverá, para avaliar o movimento da carreira, cadernos auxiliares donde conste: varias de freqüência, concursos havidos, prémios distribuidos.

60. Tanto os cartuchos de dotação gratuita como os pagos serão fornecidos aos atiradores nas carreiras sómente na própria occasião em que tiverem de ser consumidos; serão representados por senhas, em troco das quais as carreiras farão o fornecimento, apenas na occasião em que tiver de realisar-se o consumo.

61. É obrigatório o bilhete de identidade do atirador.

62. Os sócios das Sociedades de Tiro, da Instrucção Militar Preparatória e desportivas, que usem bilhete de egualamentares dessas sociedades, apresental-os hão na primeira sessão a que concorram para lhes ser aposto o sêllo branco da carreira, se o houver, e rubrica do dire...

66. Os atiradores não filiados em qualquer daquelas sociedades ou em sociedade que não adopte bilhete de identidade serão obrigados a adquirir o de modelo n.º 7, fornecido pela Carreira de tiro.

67. A apresentação do bilhete de identidade feita por qualquer atirador é condição suficiente para se lhe permitir a prática de tiro em carreiras livres ou quaisquer exercícios de tiro de guerra.

I — Inscrições, composição e concursos; classificação e distribuição dos atiradores

68. Haverá anualmente os seguintes concursos obrigatórios, regionais e nacionais:

a) Os concursos locais são organizados pelas sociedades existentes em qualquer povoação ou concelho e neles só poderão tomar parte os atiradores inscritos na carreira respectiva;

b) Os concursos regionais serão organizados pelas respectivas federações distritais, e, caso estas não existam, por duas ou mais sociedades de quaisquer distrito, sempre com a intervenção do comissariado da Instrução Militar Preparatória e diretor da carreira de tiro; e neles só poderão tomar parte os atiradores inscritos nos concursos do distrito;

c) O concurso nacional, quando não for organizado pelo Ministério da Guerra, será-lhe sempre submetido para aprovação do Ministério da Guerra; realizar-se-há em Lisboa, na Carreira de Tiro de Pedrouços, commemorativa da data da proclamação da República Portuguesa, e não poderão tomar parte todos os atiradores matriculados e classificados na 1ª.

Os concursos não poderão, portanto, tomar parte os diretores considerados incursos — Gomes Freire e Companheiros de Portugal.

69. O plano dos concursos locais e regionais constará:

Atiradores.

Os atiradores dividem-se em três grupos:

a) Grupo A, que compreenderá todos os atiradores já premiados em qualquer concurso local, regional, nacional ou internacional;

b) Grupo B, que será constituído pelos restantes atiradores, com exceção dos que se inscreverem nos concursos durante o ano;

c) Grupo C, que será formado pelos atiradores que se inscrevam nos concursos durante o ano.

Os atiradores, uma vez premiados nos grupos B e C, passarão aos lugares imediatos respectivamente para os grupos A e B.

Série. — 15 tiros em 3 séries de 5.

Posição. — 5 tiros deitado, 5 tiros de joelhos e 5 tiros de pé (a ordem é arbitrária).

Alvos. — Espingarda $0^m,5$ (n/40).

Pontos. — Gratuitos.

Alvo. — Circular de 10 zonas, um metro de diâmetro, canal de $0^m,80$.

Distância. — 300 metros.

Classificação:

A classificação será feita, em cada grupo, pelo maior número de pontos obtidos.

Desempates:

1.º Pelo maior número de balas assertadas.

2.º Pelo maior número na série de pé.

3.º Pelo maior número na série de joelhos.

87. Em todos os concursos os promotores responsabilizar-se-hão sempre pelos prémios a distribuir nas formas dos respectivos programas.

Concursos internacionais

88. Logo que as condições materiais da Carreira de Tiro de Pedrouços o permitam, poderão realizar-se em Lisboa concursos internacionais de tiro, para o que serão dadas todas as facilidades às Sociedades de Tiro estrangeiras, pela intermédio da Federação do Tiro Nacional Português e prévia autorização do Ministério da Guerra.

89. Os resultados gerais dos concursos nacionais e internacionais e os nomes de todos os indivíduos e sociedades, que obtiverem prémios, serão publicados na *Ordem do Exército*.

Vantagens concedidas aos concorrentes nos concursos nacionais e internacionais

5.º

Prémios

Os prémios são:

70. Em espécie { *a*) objectos de arte;
b) dinheiro.

Medalhas.

Insígnias.

71. Os prémios em objectos de arte serão, em consequência abstracto e uma das categorias, Gomes Freire, embora o programa estabeleça outras.

72. As medalhas, que serão destinadas (uma em cada categoria e que a haverá em objectos de arte; Gomes Freire são consentâneas com os nossos prémios e serão: ouro e mais vistas de prata por cada 100 atiradores, ou ao fracção de 100 superior a 50.

73. Haverá prémios em dinheiro, pelos tiros, em atiradores de cada uma categorias.

74. Nas categorias a que sejam atribuídos prémios Honra, serão estes constituídos por medalhas de ouro, prata e Campeonato estrelas, que serão objectos de arte, especialmente apropriados.

75. As insígnias são destinadas a galardoar os atiradores e serão confeccionadas por uma só vez, podendo posteriormente juntar-se-lhes a indicação do ano e distância.

76. Todos os prémios conferidos serão impressos dos respectivos diplomas.

77. As medalhas e os diplomas conferidos aos atiradores serão cuidadosamente para os respectivos corpos estabelecimentos em que servirem, e ser-lhes hão entregues, sempre que as circunstâncias o permitirem, pelos respectivos comandantes ou chefes, em formatura de parada, aproveitando-se a ocasião para, em alocução pública relativa ao acto, salientar a importância de tal prática nas sociedades modernas.

78. Na repartição dos prémios em objectos de arte pelos 3 grupos A, B e C, da categoria e que eles são sendo o seu distribuição, observar-se-há dessa maneira geral o seguinte:

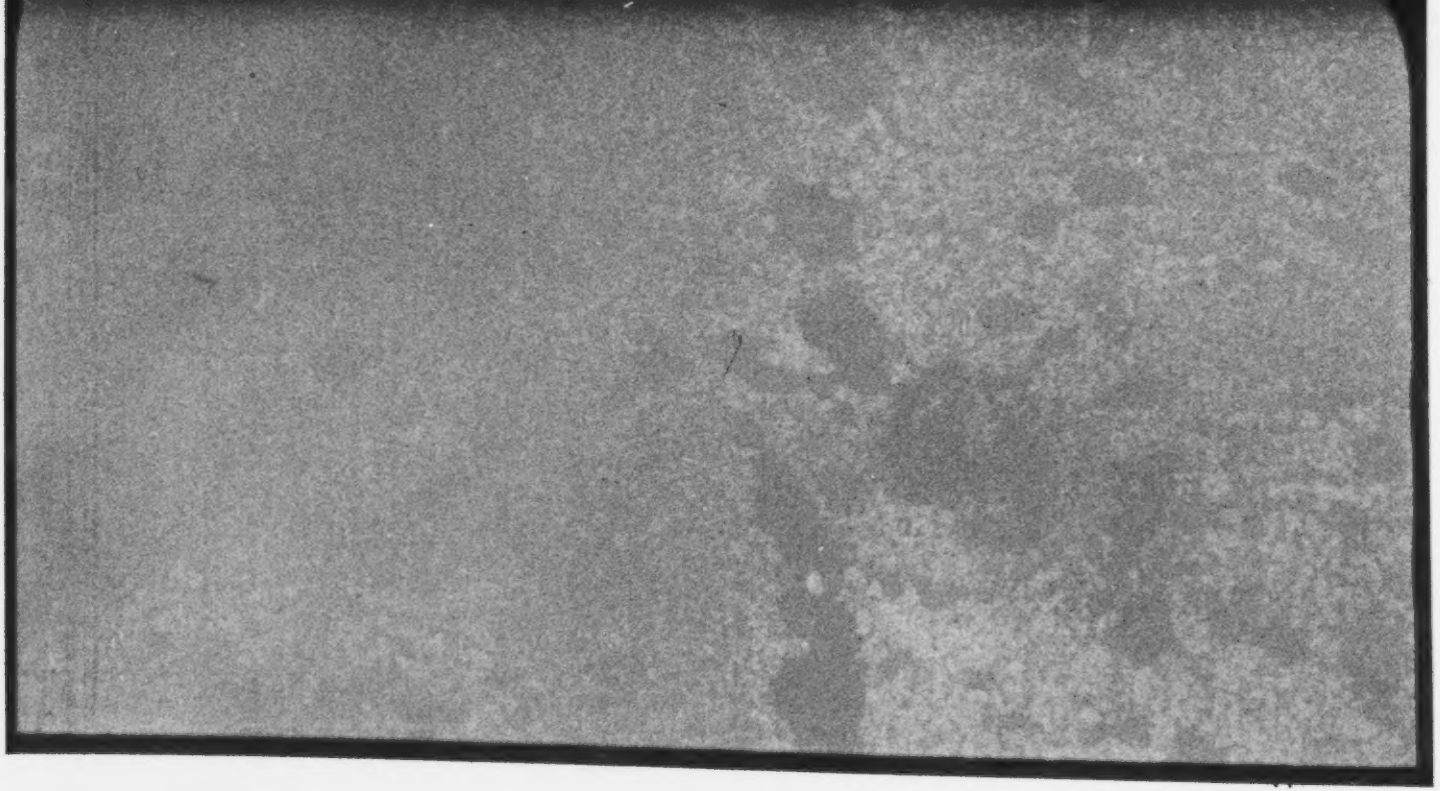
Dispostos os prémios obtidos em série, por ordem de seu valor do custo, serão primeiramente repartidos pelos três lotes, A_1, B_1 e C_1, de harmonia (não se exige porém absolutamente) com o número de atiradores existentes nos grupos A, B e C. Cada um destes lotes A_1, B_1 e C_1 será repartido em três outros lotes e tais que se tenham respectivamente:

$$a + a' + a'' = A_1.$$
$$b + b' + b'' = B_1.$$
$$c + c' + c'' = C_1.$$

Formando agora com estes lotes os lotes:

$$a + b + c = (A).$$
$$a' + b' + c' = (B).$$
$$a'' + b'' + a'' = (C).$$

obteremos finalmente os prémios que devem ser atribuídos, respectivamente, aos grupos A, B e C, sendo a ou b), a' (b' ou c'), e a'' (b'' ou c'') os lotes de prémios valor necessàriamente decrescentes.



[illegible] à classificação das diferentes categorias de [illegible] com as condições exigidas por [illegible], e propor-lhe oportunamente;

[illegible] a verificação das armas empregadas;

[illegible] diretamente ao diretor da Carreira o [illegible] de serviço para o dia imediato;

[illegible] o comando executivo será o comandante [illegible]

Compete à comissão de propaganda:

[illegible] todo quanto julgue conveniente para elevar [illegible] da Carreira Individual, quer não diretamente [illegible];

[illegible] que a Imprensa, principalmente à dia seguinte [illegible] dos concursos e tiros internacionais [illegible], de tiro, atraindo assim a atenção do [illegible] para este ramo de instrução nacional;

[illegible] desenvolver o gôsto pela prática do tiro [illegible], de modo que ela constitua uma distração per[illegible] pelo povo português.

III — Armas e munições

O Estado fornece:

[illegible] regulamentar fornecerão para instrução [illegible]

[illegible] de instrutores necessários para a instrução [illegible] prática;

[illegible] munições que são distribuídas [illegible]

[illegible] aos atiradores inscritos;

[illegible] de carabinas necessárias para a sua instrução [illegible] o preciso para o tiro de concurso ou regulamentar [illegible] e "record";

[illegible] tiro de classificação à fôrça, em regra, às armas [illegible] os indivíduos que não servirem no exército [illegible] fazer êste tiro, uma pequena espingarda [illegible] tiro;

O atirador poderá também repetir o tiro de classificação [illegible] fazer compra de aperfeiçoamento, pagando [illegible] preço.

Todos os exercícios que sejam necessários para a [illegible] do tiro de classificação e para o tiro de aperfeiçoamento [illegible] o que se refere a número exterior serão realizados [illegible] por conta do abastecimento ao preço oficial.

O armamento portátil empregado será o que estiver em exercício de tarde e paz, em regra aquele [illegible] estiver armado a infantaria.

[illegible] livre, porém, poderão empregar-se quaisquer armas [illegible] que satisfaçam às condições do artigo 4) do [illegible] 6), e que sejam compreendidas nas seguintes designações:

[illegible] de guerra (espingardas, carabinas ou pistolas [illegible] regulamentares);

[illegible] de guerra com alça deslocável, e ponto de mira [illegible] ou não;

[illegible] livres (produção);

[illegible] de curto alcance e calibre reduzido de qualquer [illegible], para senhoras e crianças.

Todos os atiradores poderão alugar para o seu [illegible] as concorrem, terminado os compromissos, [illegible] espingardas, pelo preço de 12$00 cada uma.

Todos os atiradores poderão reservar perpètuamente [illegible] para seu uso exclusivo, uma ou mais espingardas [illegible] preço de 10$ cada uma.

As receitas provenientes do aluguer e reserva de [illegible] destinadas à compra de armamento portátil.

As espingardas alugadas e reservadas não poderão [illegible] utilizadas senão pelo atirador que as alugar ou [illegible]

É obrigatória a apresentação do respectivo recibo, [illegible] sempre que o atirador necessite serviços de espingardeiro ao reservado.

[illegible] As disposições do n.º 100 não aplicarão à pistola [illegible] automática ou tiro ao excêntrico.

[illegible] Para efeitos de concursos perante o Ministério [illegible] Guerra autorizar o deslocamento dumas para outras [illegible] reservadas ou quaisquer outras.

Os encarregados pagarão o transporte dêste ao lugar [illegible] regresso, e a importância de 1$00 por cada uma que [illegible] reservada, fora por êste facto sua, ficando contudo [illegible] pela sua reboliça estragada.

[illegible] Excluídas as disposições dos n.ºs 99, 44 e 100, [illegible] quanto pagar, pode vender-se pelo preço de [illegible] cartucho cada cartucho de espingarda, e 1$ cartucho [illegible] de pistola, o certo sempre formados na base de custo [illegible] e não podem, por isso, ser levados para atirador [illegible]

[illegible] Aos atiradores é permitido adquirir armas [illegible] de guerra destruídas ou inúteis, contanto que não [illegible] as devidas garantias de segurança e [illegible] e [illegible] [illegible] com os cartuchos que o Ministério da Guerra [illegible] com a condição expressa de as terem depositado [illegible] na carreira para seu uso.

[illegible] Os comissários de segurança e juízes das armas [illegible] as qualidades das munições apresentadas pelos [illegible] atiradores, serão apreciados pelo diretor da respectiva carreira.

[illegible] Os atiradores que tiverem armas reservadas [illegible] empregar nelas peças de mira mais ou menos [illegible], conforme que tenha o mesmo, alcance, ou alcances [illegible] alça, não perdendo o direito por isso [illegible] [illegible] qualidade de armas de guerra.

[illegible] É também permitido o emprêgo de alças com dioptria, em armas reservadas, quer se usem as modificações [illegible] ponto de mira e que se refere o número anterior, [illegible] neste caso a arma considerada nas alíneas b) [illegible] n.º 99.

[illegible] Sempre que seja permitido o emprêgo de alça dioptrável, poderá também empregar-se ponto de mira [illegible] dando um alcance, mas com que se usou precisamente o [illegible] mesmo.

[illegible] É proibido introduzir modificações ou inovações [illegible] de disparo, em armas compreendidas nas alíneas a) e d) [illegible] n.º 99.

[illegible] É proibido o emprêgo de aparelhos óticos [illegible] pontaria, em sessões de tiro, que tenham de ser valoriz[illegible] para classificação, pontuação, contrôle, utilizar-se o binóculo para observação.

[illegible] O gatilho, quando alleviado, nunca poderá ter [illegible] inferior a 2 quilogrames; para a verificação desta [illegible] condição, o pêso deve actuar no meio dêle.

VIII — Deveres dos atiradores. Medidas de ordem, polícia e segurança

117. Os atiradores, qualquer que seja a sua classe e sem distinção de categoria ou graduação, dentro do recinto das carreiras ou nos exercícios de tiro, deverão obedecer a todas as indicações do pessoal da carreira, em tudo quanto diga respeito ao serviço técnico do tiro e disciplina dentro das carreiras.

a) A obrigação imposta por êste artigo não priva os atiradores do direito de se queixarem contra qualquer acto que tenham por abusivo, praticado pelo pessoal [illegible] tratar da carreira.

118. A entrada nas carreiras é pública, durante as sessões, devendo observar-se rigorosamente todas as medidas de ordem, polícia e segurança estabelecidas pelo diretor, ou por quem o representar.

119. Qualquer contravenções das ordens de serviço ou desatenções praticadas para com o pessoal da carreira motivarão, além dos efeitos legais, eliminação temporária

...mandante, se houver, regulará o procedimento de cada unidade.

...ão. A eliminação temporária pode ser determinada pelo ...mandante da carreira, e deste para a Inspecção de Infantaria a que a carreira estiver subordinada.

...ão. A eliminação permanente só pode ser determinada pela Inspecção de Infantaria a que a carreira estiver subordinada (citando, neste caso, recurso para a 4.ª Repartição da 1.ª Direcção Geral da Secretaria da Guerra).

...ão. As faltas mais graves para com o pessoal das carreiras, que atentem o decoro, por meio de palavras, gestos ou ainda outras manifestações, motivarão a prisão imediata do infractor, que será remetido ao Poder Judicial para o participação competente.

...ão. É proibido:

a) Começar o fogo antes do respectivo sinal, ou continuá-lo depois de dado o sinal de cessar;

b) Carregar as armas fora da linha de tiro;

c) Deixar a linha de tiro, ou gravar na rodeira com a arma carregada;

d) Ter a arma, inteiramente descarregada, uma vez com o cão para o ar, e a culatra aberta;

e) Apontar a arma para alguém, ainda que esteja descarregada;

f) Deixar a arma, ao terminar, com a culatra fechada;

g) Dirigir a palavra ao atirador quando este tiver a arma ao ombro;

h) Fazer movimentos de abrir e fechar a culatra e gatilho, com fim e casa exceção na direcção dos alvos;

i) Tocar nas armas alegadas, reservadas ou revistadas;

j) Sempre que o atirador descarregue a sua arma ou deixe de estar em sinal de começar fogo terá logo a frente do pára-balas de tiro com a culatra aberta e a arma descansada.

...ão. No recinto das carreiras é proibido fazer alto ou estacionar outras que possam perturbar o regular andamento das escolas de tiro ou distrair os atiradores.

...ão. Os indivíduos, sempre espectadores, não poderão, de pretexto algum, ocupar os logares destinados aos atiradores.

...ão. Os párocos não poderão ser visitados senão com autorização superior do director da carreira ou de quem o substitua.

...ão. Cada atirador deve começar o seu tiro a tempo determinado de antes.

...ão. O começamento de cada tiro o tiro, começa quando o atirador o tiro de carregador.

...ão. Em frente de cada atirador será colocado, numa ...nada ficada, o número de cartuchos correspondentes a cada série que lhe for concedida.

II — Disposições diversas

...ão. Depois de instalado, a Federação do Tiro Nacional Português submeterá à aprovação do Ministério da Guerra os projectos de distintivos individuais ou ...ais a conceder às tiro federados e dos estandartes das ...ades associadas.

...ão. Nenhuma carreira, projectada por iniciativa particular ou local, pode ser construída e começar a funcionar sem o respectivo projecto obter aprovação do Ministério da Guerra.

...ão. No caso de abandono ou condemnação de carreira ...ida por iniciativa particular ou local, ou de dissolução ...ação por que ela foi criada, todo o material de ...ento, armamento, ainda quando haja sido adquirido a ...ens de particulares, passará à posse do Ministério da ...ra, salvo armas de propriedade particular que perten...m a pessoa devidamente autorizada a possuí-las.

...ão. A instalação de carreiras de tiro reduzido para ...ens de sala fica dependente da aprovação e fiscalização ...a Inspecção de Infantaria correspondente.

I — Disposições transitórias

...ão. A matrícula dos atiradores, tal como fica ...ada, terá excepção imediata.

...ão. Aos atiradores matriculados até a presente ...ará aberta nova matrícula, até ...ão. Após A matrícula que forem comprovadas.

...ão. Os atiradores que não ...ão comprovarem ...ver-se não perpetuamente do ...ar exigido.

...ão. Aos atiradores a quem, nos termos do ...anteriores a data regulamentar, tenham sido já ...es 100 cartuchos, destinados à excepção dos ...s 2.º e do 3.º classe, como a distinção gratuita.

...ão. Os indivíduos que em Lisboa compõem a ...dos Atiradores Civis Portugueses transferirão a ...ntade apontadora, reorganizando-se como Sociedade Tiro; fazendo a sua carga toda o auxílio e ...ento à sua anterior organização.

...ão. Em atenção aos relevantes serviços, presta...ente nesta causa, à causa do tiro nacional, pelo ...dos Atiradores Civis Portugueses, e, tendo em vis...ção necessária do tiro se estender, desde já, ...do n.º 7.º desta Regulamento, considera-se inscrito título de «Sociedade de Tiro n.º 1», podendo usar sub-título, e nem, por que actualmente é designad...

Paços do Governo da República, 24 de Fever...1916. — *José Mendes Ribeiro Norton de Matos* — *Maria de Sáles*.

(Os modelos a que se refere este decreto estão ...ados na edição da *Ordem do Exército* n.º 2, 1.ª ...de 24 de Fevereiro).

Portaria n.º 506

Atendendo a que não foi possível dar hoje...mento ao disposto no § 2.º do artigo 67.º do regul...da Escola de Guerra, e tendo em vista que não ...ntadores de preenchido como a completa falta de ...ovas no quadro de alguns anos e serviços ...indispensável aumentar o número de candidatos a ...na Escola de Guerra e facilitar quanto possível a ...adamento: manda o Governo da República Portu...pela Ministro da Guerra, que, de conformidade ...pensada unânime da consulta da Inspecção do Exército, ...ta Segunda-feira no próximo ano lucivo de 1916 ...as provas de redacção a que se referem os artigos ...67.º do citado regulamento da Escola, e publicado ...em excepção o programa da prova de aptidão física ...a primeira à matrícula nos cursos das diversas ...ias da administração militar no ano lucivo de 1916 ...elaborado por aquele conselho de instrução, nos ...de § 2.º do artigo 67.º do regulamento da Escola ...Guerra.

Paços do Governo da República, 24 de Fever...1916. — *José Mendes Ribeiro Norton de Matos*.

Programa da prova de aptidão física para a matrícula ...s cursos das diversas armas e ...s da administração militar ...Guerra no ano lucivo de 1916-1917, a que se refere a ...ada.

Esta prova constará dos exercícios seguintes:

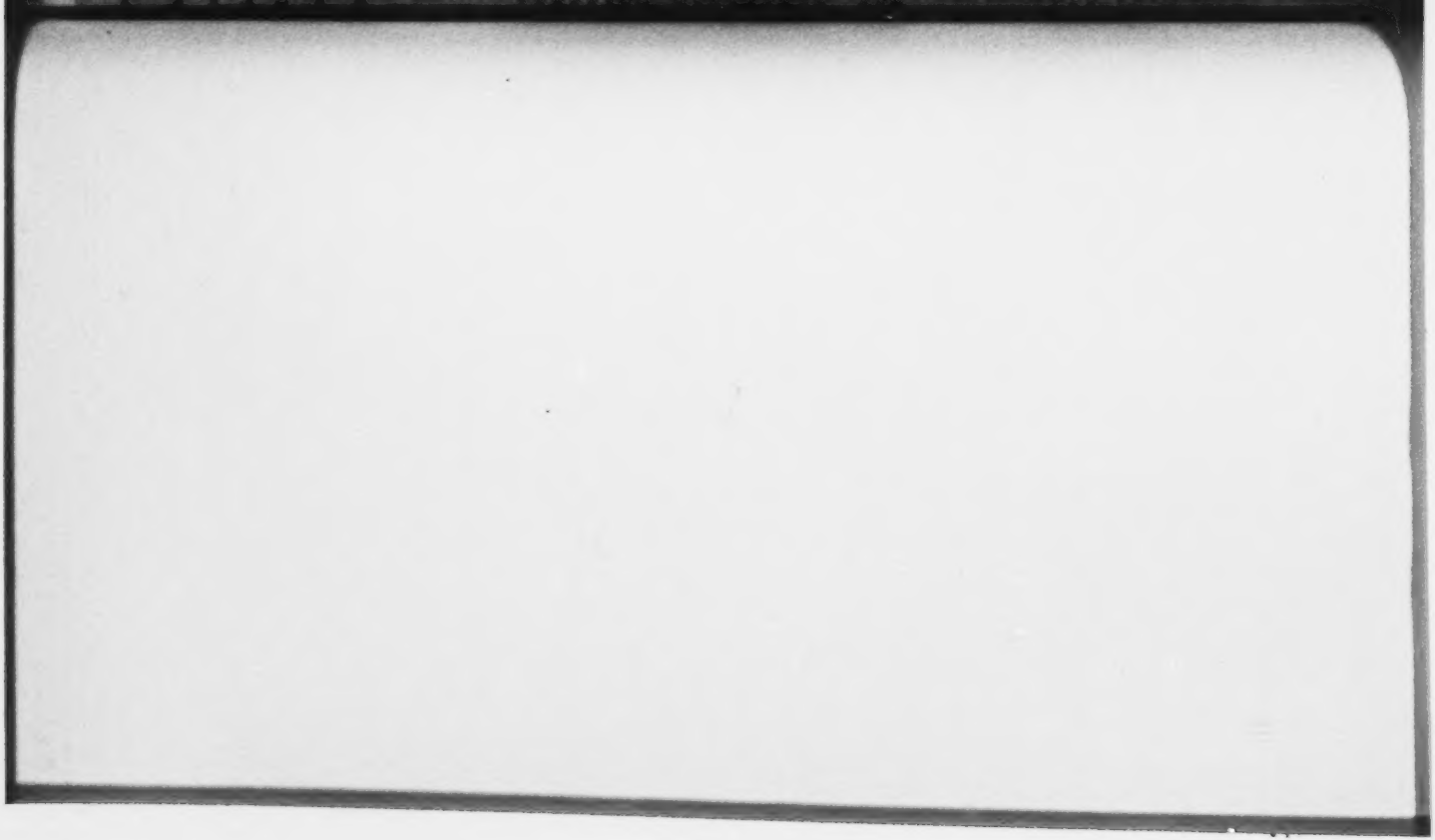
1.º Percurso de 100 metros em 5 minutos;

2.º Salto com corrida dum metro de pedra sôbre ...de altura e de 0m,10 de largura na parte superior;

3.º Salto com corrida duma vala de 2m,5 de ...com 1m,2 de profundidade, tendo os tabuões a ...de 2/3;

4.º Subida por uma corda lisa a uma altura ...

5.º Passagem a pé duma viga prismática ...num vão de 5 metros de largura, colocada a 2 ...altura.



1.º Lançamento dum pêso de 4k,750 á distância de 4 [illegible]

1.º Percurso de 100 metros em 18 segundos.

Os candidatos têm a faculdade de repetir uma vez os [illegible], o lançamento do pêso e a passagem da viga.

Os exercícios serão executados pela ordem indicada, [illegible] intervalos mínimos de três minutos depois do 1.º [illegible] 4.º e de 5 minutos depois do 3.º, os outros exercí[illegible] serão feitos successivamente.

A distância entre o muro de pedra sêca e a vala é de [illegible] metros.

A não execução de qualquer dos exercícios importa a [illegible] do candidato.

Paços do Governo da República, 24 de Fevereiro de [illegible] — *José Mendes Ribeiro Norton de Matos.*

2.ª Direcção Geral

3.ª Repartição

Decreto n.º 2:235

Sendo indispensável fixar os honorários com que devem ser remunerados os ajudantes de farmácia civis que [illegible] idade de necessidade urgente são chamados á prestação de serviço na farmácia do Hospital Militar de Lisboa, serviço que vem tomando nos últimos tempos um desenvolvimento extraordinário; em conformidade com o disposto no artigo 21.º das bases para a reforma da contabilidade pública, aprovadas pela carta de lei de 20 de [illegible] de 1907, hei por bem decretar o seguinte:

Artigo único. Enquanto o Hospital Militar de Lisboa [illegible] de dotado com o pessoal farmacêutico auxiliar indispensável para a execução do serviço, poderão ser contratados nos [illegible] prestadores de farmácia da classe civil, per[illegible] cada um, por tal serviço extraordinário, remunerações mensais [illegible] 20$00 cada uma, pagas pela verba [illegible] consignada no artigo 3.º do capítulo I do [illegible] de despesa para o ano [illegible] 1915-1916, [illegible] por lei de 31 de Agosto [illegible].

O Ministro da Guerra assim o tenha entendido e faça [illegible]. Paços do Governo da República, 24 de Fevereiro de 1916. — *Bernardino Machado* — *José Mendes Ribeiro Norton de Matos.*

Ministério da Marinha

Gabinete do Ministro

Decreto n.º 2:236

Usando da faculdade que me concede a lei n.º 480, de 7 de Fevereiro de 1915, e nos termos do decreto n.º 2:229, de 23 de Fevereiro corrente, e sob proposta do Governo: hei por bem decretar o seguinte:

Artigo único. São requisitados para serviço do Estado os navios mercantes abaixo mencionados, surtos no pôrto de Lisboa:

	Toneladas
Arlindo	1:106
Adélia	580
Antonia	1:529
Beira	3:084
Dom Manoel	1:043
Gironde	2:047
Rosa	1:210
Rosina	1:747
Maria	417
Georgia	422
Gabriel	2:580
Gironde	1:096
Jaffa	1:263
Laneck	786
Lubeck	1:055
Milos	1:758
Mazagan	1:110
Mogador	785
Mailand	1:080
Mina Schuldt	616
Nuros	1:389
Nereu	98
Picador	327
Pluto	802
Prinz Henriek	3:886
Phoenicia	2:185
Rolandseck	757
Roterdam	1:385
Rhodos	1:220
Sophie Rickmers	2:262
Thygetos	1:817
Uckermark	2:662
Wurtemberg	4:829
Westerwald	2:900
Santa Ursula	2:340

Os Ministros de todas as Repartições assim o tenham entendido e façam executar. Paços do Governo da República, 24 de Fevereiro de 1916. — *Bernardino Machado* — *Afonso Costa* — *Artur R. da Almeida Ribeiro* — *João Chagas* — *Tenente Vitorino Henriques Godinho* — *José Mendes Ribeiro Norton de Matos* — *Vitor Hugo de Azevedo Coutinho* — *Augusto Luiz Vieira Soares* — *António Maria da Silva* — *Alfredo Rodrigues Gaspar* — *Frederico António Ferreira da Simas*.

Decreto n.º 2:237

Atendendo a que é de urgente necessidade iniciar os trabalhos preparatórios para o serviço de transportes marítimos feitos pelos navios requisitados, na conformidade do decreto n.º 2:229, de 23 de Fevereiro de 1916, e usando das faculdades que me conferem as leis n.º 37[illegible] de 2 de Setembro de 1915, e n.º 480, de 7 de Fevereiro de 1916: hei por bem, sob proposta do Govêrno, decretar o seguinte:

Artigo 1.º Os navios requisitados, na conformidade do decreto n.º 2:229, de 23 de Fevereiro de 1916, e cuja requisição foi confirmada pelo decreto n.º 2:236, de [illegible] de Fevereiro de 1916, ficam desde já sob a administração duma comissão assim composta:

1 oficial de marinha;
1 oficial maquinista;
1 oficial da administração naval.

Art. 2.º A esta comissão compete, de acôrdo com o Ministro da Marinha:

1.º Promover, á medida que julgar conveniente, as indispensáveis beneficiações, reparações e adaptação dos navios requisitados;

2.º Adquirir o material fixo e de consumo, que [illegible] preciso para a sua utilização;

3.º Consultar pessoal técnico, quando entender necessário;

4.º Requisitar o pessoal de escrita e de expediente que carecer.

Art. 3.º É aberto no Ministério das Finanças, a favor do da Marinha, um crédito extraordinário de 900.000$ para ocorrer ás primeiras despesas que resultem da execução dêste decreto e do decreto n.º 2:229, de 23 de Fevereiro de 1916.

Art. 5.º Fica revogada a legislação em contrário.

Os Ministros de todas as Repartições assim o tenham entendido e façam executar. Paços do Governo da R[illegible]

... 24 de Fevereiro de 1916. — *Bernardino Machado* — *Afonso Costa* — *Artur P. de Almeida Ribeiro* — *João Gonçalo de Miranda* — *José Mendes Ribeiro Norton de Matos* — *Vítor Hugo de Azevedo Coutinho* — *Augusto José Vieira Soares* — *António Maria da Silva* — *Alfredo Rodrigues Gaspar* — *Frederico António Ferreira de Simas*.

MINISTÉRIO DAS COLÓNIAS

Direcção Geral das Colónias

2.ª Repartição

PORTARIA N.º 595

Aos governadores das provincias ultramarinas, para seu governo e mais convenientes: manda o Governo da República Portuguesa comunicar que foi prorrogado, até o fim da guerra, o prazo de validade do decreto rial italiano, de 2 de Maio do ano findo, relativo á entrada e residencia de estrangeiros em Itália, assunto a que se refere a portaria de 9 de Junho de 1915, publicada no *Diario do Governo* n.º 110, 1.ª série, de 11 do mesmo mês e ano.

Paços do Governo da República, 24 de Fevereiro de 1916. — O Ministro das Colónias, *Alfredo Rodrigues Gaspar*.

MINISTÉRIO DE INSTRUÇÃO PÚBLICA

Repartição de Instrução Universitária

DECRETO N.º 2:230

(Publicado em suplemento ao *Diário* n.º 34, de 25 de Fevereiro de...

Tendo em atenção o disposto na lei n.º 478, de ... Janeiro de 1916, e nos artigos 33.º, n.º 5.º, e 87.º ... creto-lei de 19 de Abril de 1911; e

Usando das faculdades que me confere o n.º ... artigo 47.º da Constituição Politica da República ... guesa:

Hei por bem, sob proposta do Ministro de Instrução Pública, decretar o seguinte:

Artigo 1.º Os Senados das Universidades da ... blica e os conselhos das escolas de ensino superior ... filiadas nas Universidades, ficam autorizados a abo... faltas dadas pelos alunos nos respectivos cursos ... e nos trabalhos práticos quando reconhecerem que ... faltas são justificáveis por qualquer motivo em que ... determinadas por dúvidas na interpretação e ap... dos regulamentos escolares.

Art. 2.º Este decreto entra imediatamente em ...

Art. 3.º Ficam revogadas as disposições em co...

O Ministro de Instrução Pública assim o tenha ... dido e faça executar. Paços do Govêrno da Re... 23 de Fevereiro de 1916. — *Bernardino Machado* ... *derico António Ferreira de Simas*.

IMPRENSA NACIONAL DE LISBOA

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.:

I, ALEXANDER GILCHRIST, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby Certify that the Writings annexed to

have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this

Seal 12th day of September

in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the said United States the One Hundred and Forty-seventh

Alex Gilchrist jr.

CLERK

SEP 14 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1922.

Nos. 279, 280, 281, 282 and 283.

TIETJEN & LANG DRY DOCK COMPANY,
Libellant-Appellee,

against

THE STEAMSHIP "SAO VICENTE," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,

against

The Steamship "MORMUGAO," her engines, etc., Transportes Maritimos do Estado,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

THOMAS De SIMONE,
Libellant-Appellee,

against

The Steamship "MORMUGAO," her engines, etc., Transportes Maritimos do Estado,
Claimant-Appellant.

THOMAS De SIMONE,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

BRIEF FOR THE CLAIMANT AND RESPONDENTS-APPELLANTS.

F. DUDLEY KOHLER,
Proctor for Claimants and Respondents-Appellants,
25 Broadway,
New York City.

Press of Fremont Payne, Inc., 80 Washington St., New York City.

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Supreme Court of the United States

October Term, 1922.

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BRIEF FOR APPELLANT.

Statement of Facts.

The facts in all of the above cases are very similar.

In the first case the Tietjen & Lang Dry Dock Company, a corporation organized under the laws of the State of New Jersey, engaged in the business of ship repairing, with a shipyard at Hoboken, New Jersey, filed its libel in the United States District Court for the Southern District of New York on the 14th day of April, 1921, for the recovery of $69,000 for materials and supplies alleged to have been furnished to the steamship "Sao Vicente" and for work, labor and services alleged to have been performed in docking and repairing said ship.

The steamship "Sao Vicente" was then and is now owned by the Government of the Republic of Portugal. It was the public property of that government and was operated by the Transportes Maritimos do Estado, which is a department of the Sovereign Government of Portugal. Process was issued to the United States Marshal for the Southern District of New York and the steamship "Sao Vicente" was arrested thereunder. Thereafter the Vice Consul General for the Government of Portugal by a proctor on behalf of the Republic of Portugal filed a claim of ownership and a bond for the release of said ship, and also on the 27th day of May, 1921, an answer was filed to the libel in which it was pleaded that the said steamship was the property of the sovereign government of Portugal and engaged in the public service of said sovereign government. The answer objected to and protested against the assumption

of jurisdiction by the said District Court on the ground that the said ship was owned by said Government of Portugal, that this action was an action against said government and that as the said government of Portugal could not be sued in any of the courts of the United States without its consent the action was not maintainable against the said ship or its owner. The libellant filed exceptions to this answer on the ground that it did not state facts sufficient to constitute a defense to the matters alleged in the libel and that by appearing generally and answering the libel the claimant had waived any claim for immunity and objection to the jurisdiction of the said District Court. These exceptions were sustained and an interlocutory decree sustaining said exceptions and a final decree for the sum of $70,037.80 were entered in favor of the libellant.

Maxwell Rose also instituted two actions in the said District Court, one in rem against the steamship "Mormugao" for $25,794.02 for services as stevedores and wharfage furnished to the "Mormugao" and the other in personam with a clause of foreign attachment against the Transportes Maritimos do Estado for $24,634.11 for services as stevedores and wharfage furnished to the steamship "Cunene" also owned by the said Transportes Maritimos do Estado. The libels in these actions were filed on the first day of December, 1920, and the steamship "Mormugao" was also arrested in these cases. A claim of owner and stipulations were filed to release her, and on December 24th, 1920, answers were filed setting up the same defenses as in the Tietjen & Lang Dry Dock case and the DeSimone cases. Exceptions were also

filed in these cases on the same grounds as in the preceding cases and in these Rose cases the exceptions were sustained and final decrees were entered in the action in rem against the "Mormugao" for $27,963.71 and in the action in personam against the Transportes Maritimos do Estado for $26,716.43.

Thomas DeSimone also instituted two actions in the United States District Court for the Southern District of New York, one in rem against the S. S. "Mormugao" for provisions and supplies alleged to have been furnished to the "Mormugao," amounting to $23,717.04, and the other in personam against the Transportes Maritimos do Estado, with a clause of foreign attachment for provisions and supplies alleged to have been furnished to the Steamship "Sao Antao," also the property of the Transportes Maritimos do Estado, amounting to $16,554.50. The libels were filed in both of these actions in the United States District Court for the Southern District of New York, on the first day of December, 1920, Processes were issued and the Steamship "Mormugao" was arrested in both cases. Thereafter the claims of ownership and stipulations were filed as in the Tietjen & Lang Dry Dock case to release the ship and answers were filed on December 24, 1920, in both cases similar to and setting up the same defenses, as in the Tietjen & Lang Dry Dock Company case. The libellants excepted to these answers on the same grounds as in the Tietjen & Lang Dry Dock case.

Upon the argument of the exceptions in these DeSimone cases Manton, J., overruled the exceptions, saying that "the Portuguese government did

not waive the jurisdictional question by its appearance and answer to the libel." (Appendix C. R. annexed hereto.) These two DeSimone cases were thereafter tried together. *The full record of the trial is contained in the two printed records of these cases* which should have been printed as one record. At the close of this trial Manton, J., decided that "after having appeared and answered generally the claimant and respondent could not avail itself of that part of the answer which sets up the special defense of sovereignty in the ownership and operation of the vessels," thus directly reversing himself as to his decision on the motion to sustain the exceptions to the answers. Final decrees were thereafter entered in favor of DeSimone, one in the action against the "Mormugao" in rem for $25,531.23 and the other in the action in personam against the Transportes Maritimos do Estado for $17,804.42.

From all of these decrees appeals were taken to the United States Circuit Court of Appeals for the Second Circuit which affirmed all of the decrees of the District Court, and the appellants now came before this Court upon writs of certiorari granted for the review of the affirmances of these decrees of the said District Court by said Circuit Court of Appeals.

POINT I.

The Steamships "Sao Vicente" and "Mormugao" were owned and operated by the independent Sovereign Government of Portugal and they and their owner were immune from suit in the United States Court.

1. These facts are admitted for the purposes of this suit. The answers in the in rem suits deny that the Transportes Maritimos do Estado is a corporation organized under the laws of Portugal and allege that the ships are owned and operated by the Sovereign Government of Portugal and the answers in the personam action state that the vessels are owned by the Transportes Maritimos do Estado, that said Transportes Maritimos do Estado is a department of the Sovereign Government of Portugal and all the answers plead that the said Transportes Maritimos do Estado or the government of Portugal cannot be sued in the Courts of the United States without its consent. The libellants filed exceptions to all of the answers which operated as demurrers and thus for the purposes of this suit admit the truth of these allegations and the consequent immunity of the vessels and their owner as claimed.

The Seminole, 42 Fed., 924;
Dennis vs. Slyfield, 117 Fed., 474, 54 C. C. A., 520;
The Schuylkill, 249 Fed., 781;
The Fred E. Sander, 212 Fed., 545;
Pacific R. Co. of Missouri vs. Mo. Pac. Ry. Co., 111 U. S., 505;
Boyer vs. Boyer, 113 U. S., 689, 701.

That the Transportes Maritimos do Estado is actually a part of the Sovereign Government of Portugal and therefore itself sovereign and that the steamships involved in these actions were actually owned by it is amply shown by the evidence adduced upon the commission sent to Lisbon in the case of Mattes vs. Transportes Maritimos do Estado, now pending in the District Court of the Southern District of New York, certified copies of which are herewith respectfully submitted as Exhibit 1 and to pages 24 to 29, 82 to 92, and 152 to 156, all inclusive, the attention of this Honorable Court is earnestly requested.

2. The said steamships and their owners were therefore under the law, immune from the jurisdiction of the United States Courts, as it is well settled that a sovereign government cannot be sued in a United States Court without its consent, nor can it be compelled to submit to the jurisdiction of said court by the necessity of defending its property from attack by legal process.

Beers vs. Arkansas, 20 How., 527;
The Siren, 7 Wall., 152, 154.

The immunity of a *foreign* is in no way analogous to that of a domestic sovereign and does not rest upon the same principles. While a domestic sovereign voluntarily may submit to the jurisdiction of its own courts, neither a state nor the federal government does or should impose the jurisdiction of its courts upon a foreign sovereign, as by so doing it transgresses the dignity of the foreign sovereign. It is universally recognized by

the comity of nations that a foreign sovereign and its property is immune from the jurisdiction of our courts.

The Exchange, 7 Cranch, 116, 11 U. S., 116;
The Carlo Poma, 259 Fed., 369;
Briggs vs. The Light Ships, 11 Allen, Mass., 157;
The Fidelity, 9 Ben., 333;
The Maipo, 252 Fed., 627;
The Roseric, 254 Fed., 154;
Mason vs. Intercolonial Railway, 197 Mass., 349;
The Davis, 10 Wall., 15;
Long vs. The Tampico, 16 Fed., 491;
The Attualita, 238 Fed., 909;
The Luigi, 230 Fed., 493;
The Othello, 5 Blatchford, 342;
The Florence H, 248 Fed., 1012;
Workman vs. The Mayor of New York, 179 U. S., 552.

It has indeed been held that if the Courts of the United States should exercise such jurisdiction without the consent of the foreign sovereign it would amount to a declaration of war.

The Exchange, 11 U. S., 116;
The Maipo, 259 Fed., 367, 368;
The Luigi, 230 Fed., 493, 496;
The Constitution, 4 P. D., 39, 4 Aspin, 79;
The Parlement Belge, 5 P. D., 197, 4 Aspin., 234.

In England this doctrine of the complete immunity of a foreign sovereign and its vessels, and other property and funds has been uniformly upheld.

The Parlement Belge, L. R., 5 P. D., 197;
The Constitution, L. R., 4 P. D., 39;
The Prins Frederick, 2 Dod., 451;
The Jassy (1906), P., 270;
The Gagara (1919), P., 95;
The Scotia (1903), A. C., 501;
The Porto Alexandre (1920), P., 30;
The Broadmayne (1916), P., 64;
The Messicano, 32 Times L. R., 519;
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The Eolo (1918), Ir., 78;
Vavasseur vs. Krupp, L. R., 9 Ch. D., 351;
DeHaber vs. Queen of Portugal, 17 Ad. & El. (N. S.), 171, 202;
Wadsworth vs. Queen of Spain, 17 Ad. & El. (N. S.), 171, 215.

3. Rights or claims such as alleged in the cases at bar are not the subject of jurisdiction of our courts but should be adjusted by negotiations through diplomatic channels between the governments concerned. They are "not judiciable but diplomatic."

The Carlo Poma, 259 Fed., 369;
The Maipo, 252 Fed., 627; 259 Fed., 367;
The Parlement Belge, L. R., 5 P. D., 197;
The Porto Alexandre (1920), P., 30.

POINT II.

The immunity of the respondent's vessels is not affected by the fact that they carried commercial cargo.

The immunity of the vessel is based upon her character as the property of the sovereign. It does not depend upon the use to which she is put. The fact that she may have been carrying cargo is immaterial.

The Pampa, 245 Fed., 137;
The Carlo Poma, 259 Fed., 369;
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The Jassy (1906), P., 270;
The Constitution, L. R., 4 P. D., 39.

POINT III.

The respondent did not waive its rights to immunity or its objections to the jurisdiction of the United States Courts.

1. In these cases the answers protested against the jurisdiction of the Court and set up distinctly the plea of immunity. A voluntary appearance and answer waives objection to jurisdiction only in cases where the court would acquire jurisdiction of the person if the process had been properly executed

within its jurisdiction. If, however, the person sued is immune from suit so that the court could not so acquire jurisdiction of his person, a general appearance and answer in which there is a protest against the exercise of jurisdiction and a plea of lack of jurisdiction does not waive this defense. The question here is not one of such a jurisdiction of the person. The pleas herein are not alone to the jurisdiction of the person but to the subject matter of the action. Although these actions are apparently to recover for services rendered and goods sold and delivered of which subject matter the court would ordinarily have jurisdiction, they are really for services rendered and goods sold and delivered to a foreign sovereign, of which the court cannot have jurisdiction without the consent of the sovereign. The subject matter of the action is sovereign property, the disposition of sovereign property, and over this subject matter the court has no jurisdiction. The question is here thus, the power of the court over the respondent and its property, this is subject matter of the actions. In such a case an appearance and answer cannot confer jurisdiction, for in such cases it is well settled that the question of jurisdiction can be raised at any time by the parties or the court itself.

De Simone vs. Transportes Maritimos do Estado, 200 N. Y. App. Div., 82, February, 1922 (Appendix B, infra, page 33).

Bradbury vs. Waukegan & W. Mining & Smelting Co., 113 Ill. App., 600;

Persons vs. Fidelity & Casualty Co., 92 Fed., 965;

Person vs. Standard Life & Accident Ins. Co., 92 Fed., 1022;

Chicago Union Traction Co. vs. City of Chicago, 70 N. E., 659;
Loomis vs. Wadhams, 74 Mass., 557;
Evansville Grain Co. vs| Machler, 88 Mo. App., 186;
Butterick vs. Richardson, 64 Pac., 390, 39 Ore., 246;
Lewisburg Bridge Co. vs. Union Co., 232 Pa., 255;
Reid vs. Reid, 72 Misc. (N. Y.), 214;
Rigney vs. Rigney, 127 N. Y., 408;
Wheelock vs. Lee, 74 N. Y., 495;
State of Rhode Island vs State of Massachusetts, 12 Peters, 657;
Carr vs. United States, 98 U. S., 432;
Dickerhoff vs. Adler, 12 Misc., 445;
Meyer vs. American Locomotive Co., 201 N. Y., 163;
Landers vs. Staten Island R. R. Co., 53 N Y., 450.

2. It is also perfectly proper to raise this question of jurisdiction by an answer to the libel, and a denial of allegations in the answer or pleading other defenses does not affect the question or constitute a waiver, as claimed by the respondents.

Knight vs. Bucer, 6 Ohio Dec., 28;
Hulburt vs. Palmer, 39 Neb., 158;
Christian vs. Williams, 35 Mo. App., 297;
The Luigi, 230 Fed., 493;
Kingdom of Roumania vs. Guaranty Trust Co., 250 Fed., 341;
Porto Rico vs. Rosaly, 227 U. S., 270;
Porto Rico vs. Ramos, 232 U. S., 627.

POINT IV.

There can be no implied waiver of objection to the jurisdiction of our Courts by a sovereign.

1. The sovereign's submission to the jurisdiction of our courts must be by its own *express* consent, by the act of the Legislature or by an equivalent sovereign act of the government itself.

Carr vs. United States, 98 U. S., 432;
People of the State of New York vs. Dennison, 84 N. Y., 272;
Valarino vs. Thompson, 7 N. Y., 576;
Hassard vs. Mexico, 46 A. D., 623, 29 Misc, 511;
United States vs. Eckford's Exrs., 6 Wall., 484;
The Exchange, 7 Cranch, 116, 117;
The Siren, 7 Wall., 152, 154;
Stanley vs. Schwalby, 147 U. S., 508;
Republic of France vs. Pittsburg Steel Export Co., etc., 112 Misc. (N. Y.), 688;
Dollar Savings Bank vs. United States, 19 Wall., 227, 239.

2. The waiver of the sovereign's immunity or objection to jurisdiction of our courts or its submission to such jurisdiction cannot be implied or inferred by any act of any agent or official of the sovereign.

Valarino vs. Thompson, 7 N. Y., 576;
Stanley vs. Schwalby, 147 U. S., 508;
United States vs. Lee, 106 U. S., 196;
Hassard vs. Mexico, 46 App. Div., 623;

3. In fact, whenever a sovereign does submit to the jurisdiction of a court so far as to permit itself to be sued, such permission is altogether voluntary, and it may withdraw its consent at will.

South and North Alabama Railroad Co. vs. Alabama, 101 U. S., 832;
Beers vs. Arkansas, 61 U S. 527.

4. Clearly it follows from the foregoing that a foreign sovereign government cannot be subjected to the jurisdiction of our courts on the ground of a waiver of its objection by failure to comply with any of the rules of practice or pleading of said courts, and since our courts have no power or jurisdiction over the person of the sovereign and the subject matter of these actions, it also follows necessarily that they cannot even assume the jurisdiction requisite to enforce such a waiver or take advantage of any departure from their rules of practice so as to acquire jurisdiction.

POINT V.

The filing of bonds or stipulations in these cases cannot be regarded as a waiver of objection to jurisdiction of our Courts.

1. The libellants lay great stress in their argument upon the filing of claims of ownership and stipulations for value by this appellant as waivers of immunity and objection to the jurisdiction of the United States Courts. This argument is wholly untenable. It is admitted for the purposes of these

actions and appeals by the exceptions to the answers herein that the Transportes Maritimos do Estado is sovereign and that the vessels involved in these actions are sovereign property (Point I supra). The filing of these claims and stipulations were not the acts of this sovereign appellant in its sovereign capacity, but merely those of persons here, assuming without sufficient authority therefor, to act as agents or representatives of the owners of the vessels, and certainly these acts could have no more force or effect as waivers than the filing of the appearances or answers. Since no officer or agent of a sovereign can by any act waive the sovereign's immunity to suit without the specific legislative authority of the sovereign accompanied by its express consent to submit to the jurisdiction of the Court, and this authority and consent was wholly lacking, then this filing of said claims and stipulations by such representatives cannot operate as waivers. At most they could be regarded only as implied waivers, and there can be no waiver of a sovereign of its immunity by implication or otherwise than by express consent (Point IV, supra).

2. Moreover our courts cannot thus force an independent foreign sovereign to come into our courts and submit to its jurisdiction by attacking its property or compel the sovereign to waive its immunity or objections to the Court's jurisdiction by filing bonds to release its property when so attached.

The Exchange, 7 Cranch, 116;
De Simone vs. Transportes Maritimos do Estado, 200 N. Y. App. Div., 82, (Appendix "B", infra, page 33).

The Court in this last case citing the case of the Exchange, supra, said:

> "The court then considered the argument that the admiralty suit was a proceeding in rem solely against the property, and not a procedure directly or indirectly impleading the owner of the property, and held that a court which seizes and sells a man's property assumes to make that man subject to its jurisdiction and said (page 219): "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court." These decisions so far as I have been able to discover have never been questioned."

POINT VI.

The decisions of the United States District Court and the Circuit Court of Appeals in these actions are and permit a positive violation of the sovereignty of an independent foreign sovereign government with which the United States is at peace.

De Simone vs. Transportes Maritimos do Estado, 199 N. Y. App. Div., 602, 191 N. Y. Supp., 864, 866 (Appendix "B," infra, page 27);

Beers vs. Arkansas, 20 How., U. S., 527, 529;
Nichols vs. U. S., 7 Wall., 122, 126;
The Parlement Belge, 5 L. R. Prob. Div., 197, 214, 217, 4 Aspin., 234.

POINT VII.

There is a distinct conflict in the decisions of the Courts and an uncertainty in the law which, it is respectfully suggested, should be settled by this Honorable Court.

1. One of the judges in the District Court in the De Simone case on March 16, 1921, decided on a motion to sustain exceptions to the answer that this appellant did not waive its objection to the jurisdiction of the Court by its appearance and answer (Appendix "C," hereto attached) and on the trial of the case later the *same judge* held that it did waive its immunity upon these grounds (Transcript of Record in De Simone v. Transportes Maritimos do Estado, page 29).

2. While the De Simone cases were pending in the District Court, the libellants prosecuted a suit upon precisely the the same cause of action in the New York State Supreme Court in the First Department. The defendant, this appellant, appeared and answered as in the District Court. The plaintiff demurred and the demurrer was sustained, but on appeal the Appellate Division unanimously sustained the defense of sovereignty and held that the

sovereign did not waive this defense of its immunity by a general appearance and answer (Appendix "A" hereto attached). Shortly thereafter the Appellate Division denied a reargument or leave to appeal to the Court of Appeals, and then rendered a more extended opinion, commenting on the opinion of the Circuit Court of Appeals of this Circuit, and fully and clearly discussed the questions of jurisdiction involved in these cases in complete support of this appellant's contention (See Appendix "B," attached, where this opinion is printed in full).

POINT VIII.

The decisions of the United States District Court and the Circuit Court of Appeals in these cases are in conflict with the decisions of the United States Supreme Court and with the general principles of the law as laid down by the Federal Courts.

1. There have been no decisions which have held that by appearing and answering in an action in which the effort was made to bring a sovereign into court originally as a party, the sovereign waived its immunity. The few cases which may seem to uphold this theory of waiver are cases in which the sovereign, after inception of the suit, intervened and expressly asked to be permitted to come into the suit as a party. The law has been consistently against the theory of waiver by a sovereign as asserted by the libellants in these cases.

Kingdom of Roumania vs. Guaranty Trust Co., 250 Fed., 341;
The Luigi, 230 Fed., 493;
Porto Rico vs. Ramos, 232 U. S., 627;
Porto Rico vs. Rosaly, 227 U. S., 270;
Kawananakoa vs. Polyblank, 205 U. S., 349;
Smith vs. Reeves, 178 U. S., 436;
Richardson vs. Fajardo Sugar Co., 241 U. S., 44;
Gunter vs. Atlantic Coast Line R. R. Co., 200 U. S., 273;
Clark vs. Barnard, 108 U. S. 436.

(a) In the Kingdom of Roumania vs. Guaranty Trust Co., supra, it was held that even by directly invoking the jurisdiction of the Court, the sovereign did not waive its immunity to the extent of subjecting itself to an affirmative judgment. The Court said (Italics ours):

> "It is the long accepted law that a foreign sovereign cannot be sued nor his property attached in the courts of a foreign friendly country without his consent. Nor can the defendant when sued by a foreign sovereign avail himself of any counterclaim or set-off except perhaps a set-off arising out of the same transaction. *Under no circumstances can he obtain an affirmative judgment.*"

(b) If this be the law, it surely cannot be successfully claimed that by pleading to a libel against it and directly asserting and claiming its immunity therein the sovereign waived its immunity. In fact "it is an established principle of jurisprudence in all

civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission" (Beers vs. Arkansas, 20 How, 527). The exemption from direct suit is without exception and there is no distinction between suits directly brought against the sovereign and suits against its property (The Siren, 7 Wall., 152, 154). In Smith vs. Reeves, supra, Justice Harlan said:

> "The suability of a state without its consent is a thing unknown to the law. This has been so often laid down and acknowledged by Courts that it is hardly necessary to be formally asserted. It may be accepted as a point of departure unquestioned."

2. The cases relied upon by the libellants as establishing their theory of waiver are Clark vs. Barnard, 108 U. S., 436, 437; Gunter vs. Atlantic Coast Line R. R. Co., 200 U. S., 273, 284, 289; Porto Rico vs. Ramos, 232 U. S., 627; Richardson vs. Fajardo Sugar Co., 241 U. S., 44, and Veitia, et al. vs. Fortuna Estates, 240 Fed. R., 256, 262. These cases involve chiefly questions of the sovereignty of a state or territory as a part of the United States. None of them touch upon questions of the jurisdiction of our Courts over an *independent foreign sovereign or of a waiver by such a sovereign.* The sovereignty of a state of the Union is very different from that of a foreign government. There is nothing analogous in the immunity of one to that of the other. A state of the Union is not an independent sovereignty either in relation to foreign governments or to another state and as Page, J., says in

De Simone vs. Transportes Maritimos do Estado (Appendix "B," page 37, infra), the right of a Court of this country to assume jurisdiction over a foreign sovereign or to seize its property cannot be reasoned from analogy to the right to so treat another state.

3. It is respectfully submitted that all of the cases which might at first appear to be contrary to the principles of law relied upon by this appellant, can readily be distinguished and so shown to be really not opposed to or to be actually in harmony with the principles contended for by this appellant. In Clark vs. Barnard (supra), Clark was sued in his administrative capacity as treasurer of Rhode Island and he demurred and then answered. The funds in dispute were paid into the Registry of the Court and then the State of Rhode Island itself filed a claim to this fund. In other words, the state thus voluntarily came into court as an aggressive litigant itself invoking the jurisdiction of the Court in its behalf. In the Luigi case (230 Fed., 493), also cited by the libellants, the vessel was a privately owned vessel, held under requisition or charter by the sovereign. In this case, the owner filed a claim of owner and bond and the Court then allowed the attachment to stand not on the ground of waiver of objection by the sovereign, but only on the ground that private owners had intervened and that therefore the rights of the sovereign could no longer be affected.

POINT IX.

The procedure by appeals to the Court of Appeals and then by writ of certiorari was proper practice and the appellant is properly before the Court.

1. The questions at issue are not within Section 238 of the Judiciary Code.

The appeals herein could not properly have been taken directly from the District Court to this Court. The libellants seem generally to concede that the District Court would not have jurisdiction over this sovereign, had not the sovereign waived its right to object to that jurisdiction by its appearances and answers. The questions at issue, therefore, are not questions of jurisdiction alone, which can be so certified to the Supreme Court by the Court below for decision, but questions also of pleading and waiver.

Lau Ow Bew vs. United States, 144 U. S., 47, 58.

2. The decisions of the District Court as to jurisdiction on the motions to sustain exceptions to the answers were not final in that they did not dispose of the cases. They sustained the jurisdiction and left the final disposition of the cases for the later trial. To entitle a party to appeal directly to the Supreme Court from a decision of the District Court as to jurisdiction, the decision must finally dispose of the cases.

The Carlo Poma, 255 U. S., 219;
Anglo-American Provision Co. vs. The Davis Provision Co., 191 U. S., 376.

3. If, on the other hand, the appeals in these cases should have been taken direct to this Court from the District Court, the failure to do so was merely an error in practice, and it needs no argument to show that where, as in these cases, the Courts of the United States could have neither jurisdiction over the subject matter of the action nor power or jurisdiction over the person of the respondent, it could not acquire or assume such jurisdiction as a result of such a mere error in practice. And it will be clear that if these appeals or writs of certiorari in these cases be dismissed on the ground only of this error or technicality, the Court will thereby assume a jurisdiction and also confirm or confer upon the lower Courts a jurisdiction which none of the Courts of the United States now has or ever has had in such cases.

4. The suggestion of the libellants in their papers in opposition to the Writs of Certiorari herein, that the petition therefor was not that of the appellant, the Transportes Maritimos do Estado, because it was made and filed by the Consul General of Portugal, is without merit. The petition shows on its face that it is intended for the petition of the Transportes Maritimos do Estado, and therefor of of the Sovereign Government of Portugal. It would be meaningless as a personal petition of the Consul General. The appellant is in fact the Government of Portugal and the petition was made by the Consul General as an official of that Government for that Government, as is clearly evidenced by its contents and by all of the proceedings herein. It is surprising also that the libellants should make such a claim, for, if the petition for the Writs of

Certiorari is not that of the Transportes Maritimos do Estado, which is a part of the said Sovereign Government because made by its representative, the Consul General of said Government, then there were no appearances, bonds or answers filed herein by the Transportes Maritimos do Estado or the respondent and owners of the vessels, as these documents show that they were only signed and verified by the said Consul General or one of his deputies or by an agent or attorney and filed by their authority; that is, they were only sustained by the same or a like authority as that supporting the petition, and therefor all that these libellants base their contention of waiver and jurisdiction upon was without authority and must fall and they are out of court. These writs moreover were granted upon this petition and these objections were then, in the granting of the writs, passed upon adversely to these libellants.

POINT X.

This Court should reverse the decrees herein of its own motion.

(1.) Since the libellants by their pleadings, as we have shown, have actually admitted that the respondent is a foreign sovereign, that the vessels involved in the actions are the property of that sovereign, and thus that the said sovereign and its property were immune from process of our courts, and as it did not waive its immunity or its objection to the jurisdiction of those courts, none of the United States Courts had or could assume jurisdiction in these cases either over the subject matter

of these actions or the person of the respondent, and this Court should take judicial notice of this fact and of this exceeding of jurisdiction by the courts below, and of its own motion reverse their decrees herein.

Mansfield, etc., R. Co. vs. Swan, 111 U. S., 379, 382;
King Iron Bridge, etc., Co. vs. Otoe County, 120 U. S., 225;
Cameron vs. Hodges, 127 U. S., 322, 326;
Metcalf vs. Watertown, 128 U. S., 586, 587;
Continental National Bank vs. Buford, 191 U. S., 129;
Great Southern Fire Proof Hotel Co. vs. Jones, 177 U. S., 449, 453;
Louisville, etc., R. Co. vs. Motley, 211 U. S., 149;
Capron vs. Van Norden, 2 Cranch, 126;
Jackson vs. Ashton, 8 Peters, 148;
Dred Scott Case, 19 How., 393, 400;
Bors vs. Preston, 111 U. S., 252;
Williams vs. Nottawa, 104 U. S., 209.

(2) All other questions including any question of practice or proceedings in bringing this matter before this Court, which might be raised by these libellants-appellees, are thus eliminated and need not be considered and this Court of its own motion should reverse the decrees herein of the Court below and remand the causes with directions to said court to dismiss these suits as otherwise, the libellants would have the benefit of said decrees though rendered by a court which had no authority to hear

and determine the matters in controversy in these actions.

Mansfield, etc. R. Co. vs. Swan, 111 U. S., 379, 385, 386;
United States vs. Huckabee, 16 Wall, 414.

POINT XI.

The decrees in these actions should therefore be reversed and the causes remanded to the lower Court with a direction to dismiss the suits.

New York, September 12th, 1922.

Respectfully submitted,

F. DUDLEY KOHLER,
Proctor for Claimant and
Respondent-Appellant,
25 Broadway,
New York City.

Appendix A.

FIRST OPINION.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT,

December, 1921.

JOHN PROCTOR CLARKE, P. J.
WALTER LLOYD SMITH,
ALFRED R. PAGE,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

THOMAS DE SIMONE,
Respondent,
against
TRANSPORTES MARITIMOS DO ESTADO,
Appellant.

No. 7181.

Appeal from an order of the Supreme Court, New York County, sustaining a demurrer to each of the several affirmative defenses contained in the answer.

FRANK M. PATTERSON, of Counsel (Howard S. Lake with him on the brief); for Appellant.

MEYER KRAUSHAAR, of Counsel (Emanuel Celler with him on the brief; Celler & Kraushaar, Attorneys), for Respondent.

PAGE, J.:

The complaint alleges three causes of action to recover for goods sold and delivered. The answer denies the material allegations of the complaint and sets up a defense to the first cause of action that at the time of the commenceemnt of this action there was an action in admiralty pending in the United States District Court for the Southern District of New York, in which the steamship Murmagoa, owned and operated by this defendant, was libeled by the plaintiff for the same cause of action. As a defense to the second and third causes of action, it is alleged that an action in personam in admiralty is pending in the said United States District Court for the same causes of action.

These defenses are insufficient. The action set forth in the first defense is in rem in admiralty, to enforce a maritime lien on the vessel, for supplies furnished, and is not the same cause of action as that set forth as the first cause of action in the complaint herein, which is an action in personam to recover for goods sold and delivered. The action set forth in the second defense is in personam, but is not exclusively of admiralty jurisdiction.

As there is a common law remedy for that cause of action, it may be prosecuted in the State courts. (Kennedy vs. Cunard S. S. Co., 197 App. Div., 459, 466.) It is well settled that pendency of another action for the same cause in the United States courts is not available as a defense in the State courts, or vice versa. (The Oneida County Bank vs. Bonney, 101 N. Y., 173; Gordon vs. Gilfoil, 99 U. S., 168.)

The third defense set up as against all three causes of action is a plea to the jurisdiction of the

court. It is alleged that the steamships Murmagoa, Santo Antao and Cunene, are Portuguese vessels flying the flag of Portugal, owned and operated by the defendant, and engaged in the public service of Portugal; that the defendant is and at all times mentioned in the complaint was a department of the foreign sovereign government of Portugal, a government allied with the United States in the late World War, and now at peace with the United States; and the matters set forth in the complaint relate to the management of said vessels outside the jurisdiction of the United States, and that in accordance with the Merchants Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York. The defendant objects to and protests against the assumption of jurisdiction by this court, and alleges that it is a department of the sovereign foreign government of Portugal and cannot be sued in any of the courts of the United States without its consent, and that this action is in substance and effect an action against the government of Portugal, and as such is not maintainable against the defendant. The answer is verified by the Vice Consul-General of Portugal.

The plaintiff claims that by interposing an answer pleading to the merits, and not appearing specially, the defendant has submitted to the jurisdiction of the court and thereby waived the plea to the jurisdiction.

A voluntary general appearance of the defendant is equivalent to the personal service of the summons within the State (Code Civ. Pro., Sec. 424), and therefore waives the objection to jurisdiction of the Court in such cases as these in which the Court

would acquire jurisdiction of the person if such service was made within the State.

In the case under consideration, if the defendant is a department of the government of Portugal, and we must so consider it as the demurrer admits the facts, then the courts of this State could not obtain jurisdiction by the personal service of a summons upon any one within the State. An ambassador or consul of a foreign government, in his official capacity, is immune from the service of process of our courts. Even if the executive head of the government of Portugal were within the State, service on him would not give the Court jurisdiction. "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent or permission." (Beers vs. Arkansas, 20 How., U. S. 527, 529; Nichols vs. U. S., 7 Wall., 122, 126.) "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use. * * * To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests." (The Parlement Belge, 5 L. R. Prob. Div., 197, 214, 217.)

The plaintiff contends that by appearing and answering to the merits the foreign sovereign has

evidenced its consent that these issues be litigated in this court. Of course, the sovereign can consent that any judicial question can be determined by any court. But such consent is entirely voluntary, and it may withdraw its consent at any time. (Beers vs. Arkansas, supra.) If the defendant had answered by merely denying the allegations of the complaint, then there would have been force in the plaintiff's contention; but in the answer the defense of want of jurisdiction and a protest against its exercise is embodied. Under the Code pleading, the defendant may make a general or specific denial of the material allegations of the complaint, and set forth any new matter constituting as many defenses as he has (Code Civ. Pro., Sections 500, 507), and by presenting the defenses by way of answer the defendant was in no manner, either expressly or by implication required to abandon the facts relied upon to show that the Court did not have jurisdiction over it. (Sweet vs. Tuttle, 14 N. Y., 465; Hamburger vs. Baker, 35 Hun, 455, 457.) The complaint did not disclose that the action was against a foreign government. It was, therefore, proper to set forth that fact by way of defense.

There are several ways in which the foreign sovereignty can raise the objection to being sued. The government might have appeared and raised its jurisdictional claim; or its accredited representative might have appeared and taken the same steps, as would appear to have been done in this case, the answer being verified by its Vice Consul General; or, if there was objection to appearing as a suitor in a foreign court, that government could present through the usual diplomatic channels, the asserted public status of the defendant and the vessels, and

if the claim was recognized by the executive department of this government, it might be set forth in an appropriate suggestion to the Court by the Attorney General of the United States or by some law officer acting under his direction (Ex parte Muir, 254 U. S., 522, 532). However the objection may be presented by the foreign sovereign, the Court must give heed to it. The Court at Special Term erred in sustaining the demurrer to the third separate defense. The order will, therefore, be modified to read as follows: "That the demurrer to the first and second separate defense contained in the answer be sustained, and the demurrer to the third separate defense contained in the answer be overruled, without costs to either party as against the other," and as modified affirmed without costs.

All concur.

Appendix "B."

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

February, 1922.

Present—Hon. JOHN PROCTOR CLARKE, P. J.,
" FRANK C. LAUGHLIN,
" VICTOR J. DOWLING,
" ALFRED R. PAGE,
" EDGAR S. K. MERRELL, JJ.

THOMAS DE SIMONE, Respondent, vs. TRANSPORTES MARITIMOS DO ESTADO, Appellant.	Motion No. 58, February 10, 1922.

Motion for a re-argument of the appeal decided January 13, 1922 (App. Div.,), or in the alternative for leave to appeal to the Court of Appeals.

APPEARANCES:

MEYER KRAUSHAAR, of Counsel (Celler & Kraushaar, Attorneys), for the motion.

F. DUDLEY KOHLER, opposed.

PAGE, J.:

The inspiring cause of this motion is the fact that the United States Circuit Court of Appeals

for the Second Circuit, in a suit in admiralty, wherein the vessels libelled were in the possession and control of the above-named defendant, had dismissed the appeal and stated that "The sovereign immunity can be waived in this case." Thereafter our decision was called to the attention of that Court, with the suggestion that our decision was not in harmony with theirs, whereupon the Circuit Court handed down an opinion more fully stating their views, and their opinion is, among other things, suggested as grounds for a re-argument of this appeal. Our great respect for the learning and ability of the United States Circuit Court of Appeals for the Circuit of which this State is a part, has caused us to give careful consideration to their opinion, especially to the reasons assigned in the final statement denominated "3." The remaining part of the opinion dealing with the facts as related to admiralty procedure have no bearing upon a decision in an action at law in a court of the State of New York.

In our former opinion we held that the defendant by serving an answer denying certain material allegations of the complaint and pleading certain separate defense, among which was a plea to the jurisdiction on the ground that the defendant was a department of the government of Portugal, an independent sovereign nation in amity with the United States Government, did not thereby waive the objection to the jurisdiction. The substance of the defense was thus stated in our opinion: "The defendant objects to and protests against the assumption of jurisdiction by this Court, and alleges that it is a department of the sovereign government of Portugal and cannot be used in any of

the courts of the United States without its consent, and that this action is in substance and effect an action against the Government of Portugal, and as such is not maintainable against the defendant." To this defense a demurrer was interposed for insufficiency. We treated this answer as the equivalent of a voluntary general appearance and stated: "A voluntary general appearance of the defendant is equivalent to the personal service of the summons within the state (Code Civil Procedure §424) and therefore waives the objection of jurisdiction of the court in such cases as those in which the court would acquire jurisdiction of the person if such service was made within the states." We pointed out that it was impossible to obtain jurisdiction by the service of a summons upon any officer or representative of the Government of Portugal that might have been within this State.

The Circuit Court of Appeals, on the contrary, said:

> "3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance."

The cases relied on by the Court as establishing this principle are Clark vs. Barnard (108 U. S., 436, 447); Gunter vs. Atlantic Coast Line R. R. Co. (200 U. S., 284, 289); Porto Rico vs. Ramos (232 U. S., 627); Richardson vs. Fajardo Sugar Co. (241 U. S., 44); Veitia et al. vs. Fortuna Estates (240

Fed. R., 256, 262). In every one of these cases the question arose as to the effect of a voluntary appearance in an action in the United States Courts of either one of the states of the United States or of Porto Rico, a territory of the United States. (See Kopel vs. Brigham, 211 U. S., 468, 476).

A state of the Union is not an independent sovereignty, either in relation to foreign nations or to the other states of the United States. The Federal government is the sole sovereignty recognized by other governments. A state has no position in international matters except as represented by the Federal government. As between themselves the states are separate entities, but they have no power to make treaties or compacts with each other, except as authorized by the Congress of the United States. Claims cannot be enforced or wrongs redressed by levying war, but an action may be maintained against the offending state in the Supreme Court of the United States (N. H. vs. Louisiana, and N. Y. vs. Louisiana, 108 U. S., 76, 90). A state has been designated by Mr. Justice Holmes as a "quasi sovereign" and by Mr. Justice Harlan as "possessing some powers of sovereignty." (Georgia vs. Tennessee Copper Co., 206 U. S., 230, 237, 239.)

Within its territorial limits, a state may take and enforce laws; set up courts and define their jurisdiction; maintain a militia; exercise the police powers and rights of eminent domain; levy and collect taxes; create municipal and private corporations; and exercise generally sovereign powers. Its sovereignty ends with its state boundary lines. Its relations with other states of the Union are not governed or controlled by international law or

comity, but by a private international law, usually denominated a conflict of laws, regulated and controlled by the constitution and laws of the United States. This distinction is evident when we consider that a citizen of a state cannot sue that state in any court without its consent, because as to the citizen the state is a sovereign, but until the adoption of the eleventh amendment to the Constitution of the United States a citizen of another state could sue a state in the United States Courts (Chisholm vs. Georgia, 2 Dallas, 419, 471-2) and as demonstrated by Chief Justice Jay, there was nothing derogatory to the dignity of a state in subjecting it to suit, in a court of the United States.

It has been the practice of states either to erect special courts in which one of its citizens could prosecute claims against the state, or to confer jurisdiction on courts to hear and adjudicate such claims. Therefore its consent to waive the constitutional immunity from suit could be implied from its act by appearance as well as by express legislative provision.

In my opinion the right of a court of this country to assume jurisdiction over a cause of action against a foreign sovereign nation, or to seize and impound its property cannot be reasoned from analogy to the right to so treat another state. In New Hampshire vs. Louisiana, and New York vs. Louisiana (supra) it was distinctly held that one state cannot create a controversy with another state by assuming the prosecution of debts owing by the other state to its citizens. In United States vs. Diekelman (92 U. S., 520, 524) the Court said: "One nation treats with the citizens of another only through their government. A sovereign can-

not be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in the performance of his obligations, by treaty or otherwise voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." Alexander Hamilton wrote, "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of all mankind." (The Federalist No. LXXXI.) The leading case in this country on the immunity of a vessel of a foreign sovereignty from seizure, by the courts of the United States in a suit in admiralty is The Exchange (7 Cranch, 116) in which the schooner Exchange, owned by American citizens was seized on the high seas by a French privateer, taken to France and refitted as a vessel of war. Two years after she entered an American port, and upon libel filed in the United States District Court, by her former owners, was seized by process of the court. The

libel was dismissed by the District Court, the sentence of the District Court reversed by the Circuit Court and on appeal the sentence of the Circuit Court reversed and that of the District Court affirmed by the Supreme Court of the United States. Mr. Justice Marshall writing for the Court held that a public armed vessel of a foreign nation entering the port of a friendly state under the circumstances of that case is not subject to the judicial tribunals of the United States. The same principle was applied by the Court of Appeals Division of the High Court of Justice of England in the case of the Parlement Belge (L. R., 5 Prob. Div., 197 in 1880) in proceedings in rem to secure redress for loss incurred by a collision instituted against an unarmed mail packet boat belonging to the Government of Belgium, officered and commissioned by that Government and sailing between Dover and Ostend. The court held that the vessel came within the rule which extends immunity from the jurisdiction of the courts of one country to the public vessels of a foreign nation, even though incidentally carrying freight and passengers for hire. The court cited and quoted from the following cases: The Exchange (supra); The Duke of Brunswick vs. The King of Hanover (6 Beav., 1, 50); The Prins Frederick (2 Dod., 451, 456); DeHaber vs. The Queen of Portugal (17 Q. B., 171); The Athel (1 Wm. Rob., 374); Briggs vs. The Lightships (11 Allen [Mass.] 157); The Marquis of Huntley (3 Hagg., 246); The Thomas A. Scott (10 L. J., [N. S.] 726) and Vavasseur vs. Krupp (L. R., 9 Ch. D., 351). The court then said: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of

every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." The court then considered the argument that the admiralty suit was a proceeding in rem solely against the property, and not a procedure directly or indirectly impleading the owner of the property, and held that a court which seizes and sells a man's property assumes to make that man subject to its jurisdiction and said (page 219): "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court." These decisions so far as I have been able to discover have never been questioned.

Is this immunity from suit lost by appearing generally and protesting or setting up the plea of immunity by answer? As we stated in our former opinion, a voluntary general appearance of the

defendant is equivalent to the personal service of the summons within the state (Code Civ. Pro. §424) and therefore waives the objection to the jurisdiction of the Court in cases in which the Court would acquire jurisdiction of the person if such service was made within the state. It follows from this that where the person served is immune from suit in our courts so that by personal service of the summons no jurisdiction could be obtained, his service of an answer in which he protests against the assumption of jurisdiction, and pleads the want of jurisdiction as a defense, does not thereby waive the defense. For the plea goes not alone to jurisdiction of the person but to the subject matter of the action as well, although the action is to recover for goods sold and delivered, of which the Court would have jurisdiction ordinarily. It is more than this, it is to recover for goods sold and delivered to a foreign sovereignty of which the court does not, and cannot have jurisdiction except with its consent. In the case of The Parlement Belge (supra), (page 220) the Court said: "It has been frequently stated that an independent sovereign cannot be personally sued, although he carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded, and in both cases because such suit would be inconsistent with the independence and equality of the state which he represents." In one sense the defendant by pleading has submitted the question as an issue of fact to the court, and that is whether the defendant above named is a department of the government of Portugal. We did not discuss this in our former opinion for there we were dealing with the demurrer to the defense which we

overruled, thereby holding that the facts alleged, taken as true, would constitute a defense. We did not direct a dismissal of the complaint but left the issue of fact to be tried. The plaintiff claims that he is thus put at a disadvantage, as he will have to fully develop his case before the defendant is required to put in its defense. This result does not follow. The Court at Special Term would, undoubtedly, grant an order directing the issue of jurisdiction to be separately tried, as that issue if resolved in favor of the defendant would lead to a dismissal of the action, and if decided that the defendant was not a department of the government but a corporation similar to that considered by us in Ingersoll-Rand Co. vs. U. S. Shipping Board Emergency Fleet Corporation (195 App. Div., 838) then the action would be tried on its merits.

In Ex parte Muir (254 U. S., 522, 532) the Court indicated the different methods in which a foreign sovereignty could raise the question of jurisdiction. We stated in our former opinion the methods therein set forth, among which was by appearing in the action, or presenting its claim through the State Department of the United States Government and, if it sanctioned the claim of immunity, presenting it to the court through the Attorney General. In the Pesaro case (255 U. S., 216) instead of following the methods prescribed in Ex parte Muir the Italian Ambassador suggested to the court that the ship was owned by the Italian Government and at the time of the arrest was in its possession. The libellant objected that a direct suggestion by the Ambassador was admissible and that to be entertained, the suggestion should come through the official channels of the United States. This ob-

jection was overruled and the ship released from arrest.

The Supreme Court in reversing the decree said (page 219): "The terms and form of the suggestion show that the ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a "suggestion" and we think it was nothing more. In these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken (Ex parte Muir, 254 U. S., 522); and further stated that an opportunity must be given so to present and establish the matters affirmed in the suggestion in an appropriate way when the case goes back to the District Court.

In the instant case the above named defendant by its attorney answered, settting up the defense that it was a department of the Government of Portugal. Can it be said that the defendant had consented to the jurisdiction of the court when the answer presented a protest and a defense to the jurisdiction? As the Court said in United States vs. Diekelman (supra): "It rests with the sovereign against whom the demand is made to determine what he will do with it." In the instant case a defense to the jurisdiction of the court and a protest against its exercise was submitted to the court.

If that should prove to be the fact the court has no jurisdiction and could not disregard the protest and overrule the objection by a claim that by the municipal law of this State the defense was

waived, for by the law of nations an adjudication binding the sovereign to pay the judgment could not be made nor its property taken on execution to satisfy the judgment. To hold otherwise would allow the courts of this State to endanger the peaceful relations between the United States and a friendly sovereignty and furnish the latter with a *casus belli*.

In our former opinion we cited the case of Sweet vs. Tuttle (14 N. Y., 465), merely for the purpose of showing the distinction between pleas in common law pleading and answers and defenses under the code pleading; that under the former pleas in abatement and in bar could not be joined, while under the latter a defendant answers but once and he may set forth as many defenses as he thinks he has, and therefore a union of defenses in an answer did not necessarily cause the abandonment of any of them. As an illustration and in harmony with this principle we cited Hamburger vs. Baker (35 Hun, 455, 457). This case was not overruled in Reed vs. Chilsom (16 N. Y. Supp., 744, aff'd, 142 N. Y., 152), in which the non-resident defendant whose property had not been attached appeared by attorney who served a general notice of appearance, and some three months afterwards answers were served setting up several defenses and among them the lack of jurisdiction. In the Hamburger case and in the case at bar there was no notice of appearance served, but the appearance was effected by the service of an answer. A notice of appearance may be limited for the purpose of raising the question of the jurisdiction of the court and where the appearance is by demurrer or answer which raises the question of jurisdiction of

the court the defendant cannot be held to waive the objection or defense expressly stated in the pleading. §488 of the Code of Civil Procedure expressly provides that "the defendant may demur to the complaint, where one or more of the following objections appear upon the face of the complaint. 1. That the Court has not jurisdiction of the person of the defendant. 2. That the Court has not jurisdiction of the subject of the action" * * * and (§498) where any matter enumerated in §488 as grounds for demurrer do not appear on the face of the complaint the objection may be taken by answer. If not taken either by demurrer or answer the defendant is deemed to have waived it except the objection to the jurisdiction of the Court. * * * (§499). If the objection in the first instance is presented in the manner prescribed by the Code, how can the defendant be deemed to have waived it? The answer would seem to be that it has not. (Popfinger vs. Yutte, 102 N. Y., 38, 42; Hankinson vs. Page, 19 Abb. N. C., 274, 276; Wallace, J., U. S. Dist. Co., So. Dist., N. Y.; Weidman vs. Libby, 16 App. Div., 616, 622).

In the instant case if the facts stated in the defense are proved then no court in the State of New York has acquired or can acquire jurisdiction of the person or the subject matter of the action over the protest of the defendant. We therefore adhere to our original decision, and the order will be modified as directed in our former opinion.

As the order does not finally determine the action, leave to appeal to the Court of Appeals is denied with $10 costs.

ALL CONCUR.

Appendix "C."

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THOMAS DE SIMONE,
Libellant,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent.

THOMAS DE SIMONE,
Libellant,
against
S. S. MURMAGAO, etc.,
Respondent.

No. 288.

CELLER & KRAUSHAAR, Esqs., for Libellant; Meyer Kraushaar, Esq., of Counsel.

FRANK M. PATTERSON, Esq., for Respondent; Frank M. Patterson, Esq., Howard C. Lake, Esq., M. Mackenzie, Esq., of Counsel.

As a defense the respondent pleads in its answer as follows:

> "That the steamships Cunene and Santa Anato are vessels flying the flag of Portugal and are owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portu-

gal, a government now at peace with the United States and allied with the United States in the late World War, and that the matters set forth in said libel relate to the management of said vessels outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants Shipping Acts and International comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York."

Exceptions are taken to this. A motion has been made on behalf of the libellant to sustain the exceptions to such affirmative defense. The law of the United States guarantees immunity from attachment to the vessels of a sovereign. Whether the United States or a sovereign, depends not merely upon ownership, but also upon actual possession by the sovereign of the property at the time process is served. (The Davis, 77 U. S., 15; Long vs. Tampico; Same vs. Progresso, 15 Fed., 491; The Attualita, 238 Fed., 909, Carlo-Poma, 259 Fed., 369.)

This rule has been recognized in the Luigi (230 Fed., 493), and Johnson Lighterage Co., No. 24 (231 Fed., 365).

In the Pampa (245 Fed., 137), the vessel was held immune where she was in actual possession of the Argentine Government, although engaged in carrying general merchandise. To the same effect see The Maipo (252 Fed., 627); The Roseric (254 Fed., 154); Montgomery vs. City of Philadelphia (253 Fed., 473).

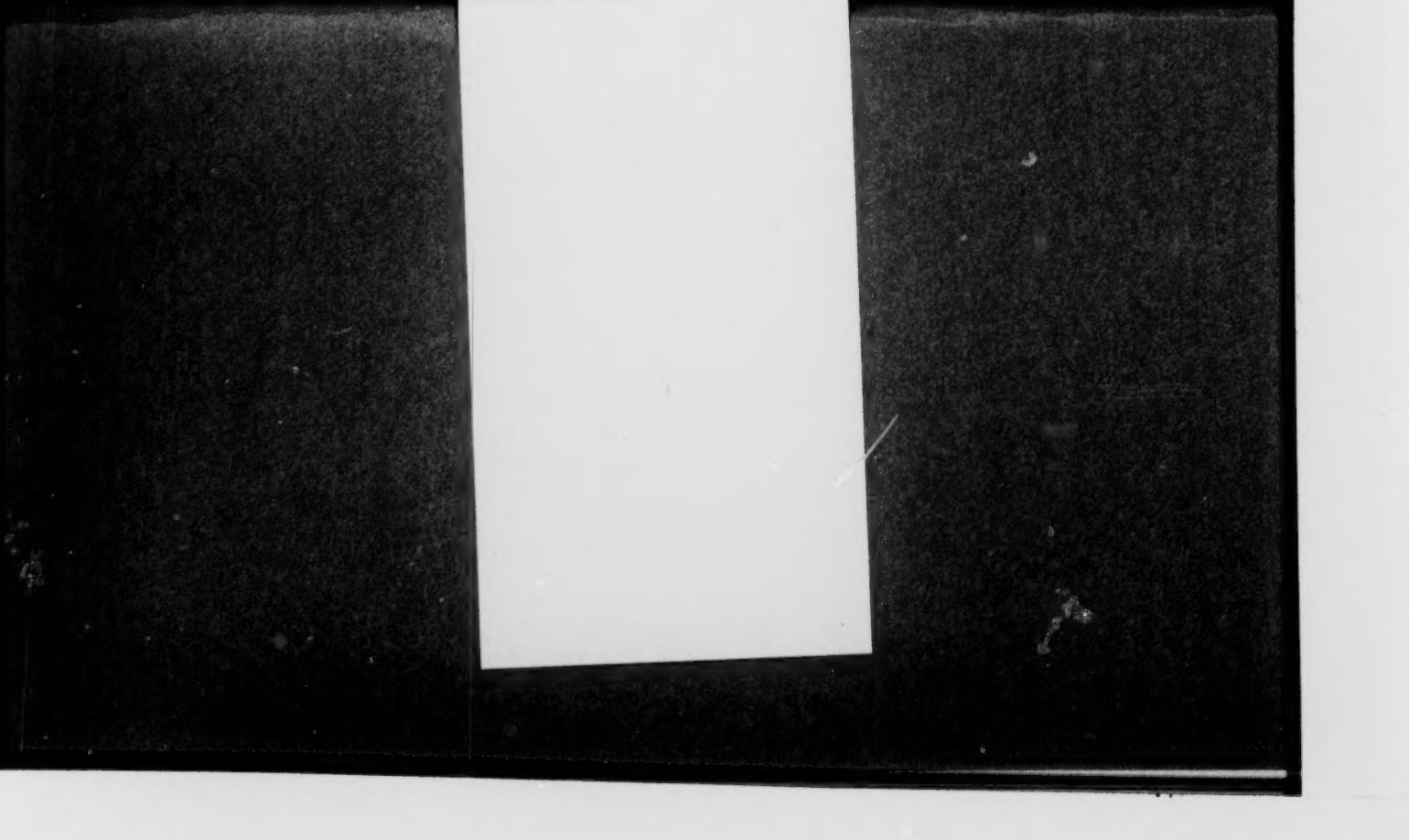
The Supreme Court recently had occasion to pass upon the case In re Muir and last week the Carlo-Poma. The rule of practice is there laid down and

is not to adopt the suggestion of the foreign ambassador but to permit the District Court to pass upon the questions as presented by the suggestion of the foreign ambassador and then determine the merits of the formal plea thus presented. I think that logically following this rule would require my permitting the District Court Judge on the trial to pass upon the sufficiency of each of the pleas of the respondent as set forth. The Portuguese Government did not waive the jurisdictional question by its appearance in answer to the libel. (Kingdom of Roumania vs. Guaranty Trust Co., 250 Fed., 341; Porto Rico vs. Ramos, 232 U. S., 627.)

The motion to sustain the exceptions is denied.

March 16, 1921.

MANTON,
U. S. Circuit Judge.



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SUPREME COURT OF THE UNITED STATES.

TIETJEN & LANG DRY DOCK COMPANY, Libelant-Appellee, *against* STEAMSHIP "SAO VICENTE," her engines, boilers, etc. TRANSPORTES MARITIMOS do ESTADO, Claimant-Appellant.	No. 279 October Term 1922. On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF APPELLEE TIETJEN & LANG DRY DOCK COMPANY.

This suit is *in rem* against the Steamship "SAO VICENTE."

The question presented herein is one of jurisdiction of the Court over the vessel, just as it was in the case of *"The Pesaro,"* (255 U. S. 216) and that question is raised here on a very similar state of facts, but is brought before this Court for review in the manner held by this Court, in *"The Carlo Poma"* (255 U. S. 219), to be unauthorized (See Assignments of Error, Record, Fol. 107, and Amended Assignments of Error, Fols. 112-118).

The only question for review is as to whether, in a suit *in rem*, in Admiralty, a general appearance by a foreign entity, as the claimant of a ves-

sel, and the releasing of the *res* by substitution of a bond in the place of the vessel, without protest, special appearance or official action by any diplomatic representative of that foreign state or our own State Department, confers jurisdiction upon the United States District Court, sitting in Admiralty, to the exclusion (by waiver, estoppel or any other doctrine) of any privilege of immunity, personal or public, which such claimant might have been entitled to assert at the outset by special appearance or proper diplomatic representation, assuming such entity could have proved itself to have had attributes or privileges of a foreign sovereign state.

The privilege of immunity from process and from the jurisdiction of the court was claimed only in the answer filed long after the general appearance of claimant and bonds and release of the vessel.

There has been no suggestion herein at any time by the State or Attorney General's department of our own government or by the accredited diplomatic representative of the foreign government mentioned, i.e., Portugal.

This is one of five cases (Nos. 279-283, inclusive, October 1922 Term) now pending in this Court, and now argued together involving the same question and brought to this Court upon the writ of *certiorari* granted upon the petition of one George A. Duarte (who was not the claimant or diplomatic representative to this country of the Republic of Portugal.)

The "Sao Vicente" was in no sense a transport, naval or military, armed or otherwise, nor was it carrying public cargoes for War relief, Army supply or Government use, but, on the contrary, this vessel was a cargo and passenger carrier only, engaged at the times in question in

transporting general cargo for private, as distinguished from public, uses or consignees, for hire, in competition with privately-owned vessels. The period in question in the present suit was March and April 1921, which, of course, was not a War period.

In the present group of cases, therefore, the Court will not be embarrassed by having before it vessels indisputably of public character.

Speaking generally, the facts in the five cases referred to are similar. They come before this Court in exactly the same manner. Three of them are suits *in rem;* two others are suits *in personam.* The appellant unfortunately has treated them, in his petition and arguments, as all *in personam,* although we can see that there is a substantial difference in the questions to be treated in the *in rem* and *in personam* feature. We understand from our associates that, in the two *in personam* actions, the allegation in the libels that the Transportes Maritimos do Estado,—claimant in the *in rem* actions,—was a foreign corporation was not denied.

The appellant, in its brief, confused this suit with certain of the others in stating the facts as to the appearance, verification, etc. As the same error has crept in at other portions of the statement and the brief, we take the liberty of setting forth here in detail the facts in so far as this suit is concerned.

Statement of Facts.

The statement which prefaces the record does not give the steps in their chronological order. The steps essential to the consideration of this Court are as follows:

Libel filed and vessel arrested April 14th, 1921 (P. 2);

Claim of Transportes Maritimos owner, filed April 15th, 1921 (P. 27);
Surety Company Stipulation for value filed April 15th, 1921 (P. 29);
Vessel released from arrest April 15th, 1921;
Answer to libel filed May 27th, 1921 (P. 5);
Exceptions to answer filed June 11th, 1921 (P. 9);
Stipulation before Commissioner as to damages filed September 19th, 1921 (P. 21);
Final decree entered October 4th, 1921 (P. 22);
Notice of appeal filed October 14th, 1921 (P. 24);
Assignments of error filed October 14th, 1921 (P. 36);
Amended assignments of error filed November 21, 1921, (P. 38);
Objection to amended assignments of error filed November 21st, 1921 (P. 37).

This libel was filed to recover the sum of Sixty-nine Thousand Dollars ($69,000) for necessary repairs and supplies furnished by the libelant to the Portuguese Merchant Steamship "SAO VICENTE" in the port of New York during the months of March and April 1921 (Record, Fols. 4-9). The vessel was arrested on April 14th, 1921, under process issued upon the said libel.

The repairs were ordered by persons to whom the management, control and possession of the ship at the port of repair had been entrusted, and in all respects the subject matter of the libel is within the provisions of the Acts of Congress, approved June 23rd, 1910, and June 5th, 1920, respectively, relating to liens on vessels for repairs and

supplies and the jurisdiction of the District Courts of the United States sitting in Admiralty.

The next day a claim of owner (Record, Fols. 81-85) and a surety company stipulation for costs and a separate surety company stipulation for value, in the sum of $69,000 were filed (Record, Fols. 85-88), and the vessel thereupon released.

The form of the claim and the stipulation for value, and of their execution, are significant, for they differ from the other cases in that here they were executed by the agent of the claimant and not by any Consul or Acting Consul, at the port of New York. The claim of owner states that the Transportes Maritimos do Estado appears before the Court, is the sole owner of the steamship and in possession thereof, and prays to defend the suit, its exact form being as follows: (Fol. 81)

> "And now, Transportes Maritimos do Estado, owner of the Steamship 'Sao Vicente,' etc., intervening for its interest in the said Steamship 'Sao Vicente,' etc., appears before this Honorable Court and makes claim to the said steamship, &c., as the same are under attachment in this Court, at the instance of Tietjen & Lang Dry Dock Company; and the said Transportes Maritimos do Estado avers that it was in possession of the said Steamship 'Sao Vicente' at the time of the issuing of process herein and that it is the true and *bona fide* owner of the said Steamship 'Sao Vicente'; and that no other person is the owner thereof; wherefore it prays to defend accordingly.
>
> Transportes Maritimos Do Estado
> By C. B. Richards & Co.,
> Leonard W. Simmons,
> a partner.
>
> Sworn to before me this
> 15th day of April, 1921.
> William H. Wilson, Jr.,
> Notary Public.
>
> Barry, Wainwright, Thacher & Symmers,
> Proctors for Claimant."

The stipulation for value states (Fol. 86):

> "Whereas, said vessel is in custody of the U. S. Marshal under process issued therein * * * and the parties hereto hereby consenting and agreeing * * * execution for the above agreed amount, with interest thereon from this date, may issue against their goods, chattels and lands * * *
>
> TRANSPORTES MARITIMOS DO ESTADO,
> C. B. Richards & Co., Agents,
> by Leonard W. Simmons, a partner.
> (L. S.)
> AMERICAN SURETY CO., OF NEW YORK,
> by Marshall L. Brower, Resident Vice-President."

The statement appearing on Page 2 of appellant's brief, to the effect that this claim and stipulation were executed by the Vice-Consul, therefore appears to be incorrect.

After the release of the vessel and on May 18th, 1921, claimant obtained, by stipulation without reservation, an extension of its time to answer the libel. These were the only proceedings had up to May 27th, 1921, when the answer was filed.

The C. B. Richards & Company, which executed these documents, is a private partnership engaged in private business as general ship agents at the port of New York.

There is no suggestion in the record that the Steamship "SAO VICENTE" was then under the official orders or directions of the Government of Portugal as such, and carrying public cargo. On the contrary, it appears from the above that she was operated under the direction of C. B. Richards & Company, as agents.

Up to this point there was not the remotest suggestion that there was any claim of, or privilege to claim, immunity from process, or that the Dis-

trict Court did not have, or might be ousted of jurisdiction.

Nor was there any suggestion to show or reason to believe that any foreign government was the owner of the vessel.

No intervening application or suggestions have ever been filed herein by the Executive or State Departments of our Government, nor have the official diplomatic representatives of Portugal, that is to say, the accredited Ambassador or Minister, ever, up to the present time, intervened or asserted any interest on behalf of his Government, or filed any suggestions in the matter now before the Court. The petition to this Court herein is by one George Duarte, claiming to be Consul General at New York, but there is not even the State Department certificate as to his identity or recognition as such.

The answer in this case was not filed until May 27th, 1921. It alleges as a separate defense (Record, Fols. 17-20) that the Steamship "SAO VICENTE" was "*owned and operated by the Transportes Maritimos* do Estado, which was a department of the Sovereign Government of Portugal * * * and that the matters set forth relate to the management, control and operation of the said vessel," and that by international comity and the Merchant Shipping Acts, the matters in question should be left to the Portuguese Consul at the port of New York for determination, and that therefore the suit was not maintainable against the vessel. It admits that the libelant performed services in repairing and docking the vessel, and furnished necessary materials, and that the same had not been paid for. This answer was verified by the Vice-Consul of Portugal, and for the first time intimated that a claim for immunity might be raised herein.

There is, however, *no allegation that the vessel is owned by the Government.* It is clear from the execution of the documents that the Transportes Maritimos do Estado was a separate entity, and this is not denied or questioned by the answer, which, in fact, states, by way of description only, that that entity was in some way associated or connected with the Government as a department thereof. (Record, fol. 254).

It is significant that the answer is verified on information received regarding the Steamship "Murmugao" with no reference to the steamship involved in this suit (Record fols. 22 & 248, 255.)

Exceptions to the answer were promptly filed, on the ground that the answer did not state facts sufficient to constitute a defense to the libel by reason of the fact that such defense, if any, had been waived (Record, Fol. 26).

A similar answer was interposed under similar circumstances in the case of *Maxwell Rose* vs. *S. S. "Murmugao,"* and like exceptions were filed thereto. The exceptions in both cases duly came on to be heard and were argued together before the District Court, where they were sustained (For opinion, see Record, Fols. 28-44). Thereupon an interlocutory decree in libelant's favor was entered on or about August 17th, 1921.

The parties stipulated, again without any reservations, that the commissioner might report the amount due the libelant to be the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69) with interest, which was done (Record, Fols. 56-60). The stipulation reads as follows (Fol. 62):

> "The damages of the libelant herein having been fixed by mutual agreement at the sum of Sixty-seven Thousand Nine Hundred and Fifty-five and 69/100 Dollars ($67,955.69),

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties herein that the Commissioner, appointed by the interlocutory decree entered herein on August 17th, 1921, for the purpose of ascertaining and computing the amount due to the libelant in the premises, may find and report, without the taking of further testimony, the amount due the libelant to be the sum of $67,955.69, with interest thereon from April 12th, 1921.

Dated, New York, September 19th, 1921.

CROWELL & ROUSE,
Proctors for Libelant.
FRANK M. PATTERSON,
Proctor for Claimant."

The final decree was entered October 4th, 1921 (Record, Fols. 64-69), and an appeal from the said final and interlocutory decrees *was taken by the "S. S. 'SAO VICENTE,' Claimant,"* to the Circuit Court of Appeals on or about October 14th, 1921 (Record, Fol. 71).

Respondent then raised the question of jurisdiction by a motion to dismiss the appeal, which, after extended argument, was granted on December 23rd, 1921, the Court saying (Record, Fol. 163):

> "This motion to dismiss is granted. The sovereign immunity can be waived and has been waived in this case."

An order was entered dismissing the appeal and directing that mandate issue accordingly.

Appellant then made an application for re-argument (Record, fols. 172-221), which was granted (Fol. 225). After said re-argument the previous decision of the Circuit Court of Appeals was re-affirmed on January 30th, 1922 (Record, Fol. 229), and an extended opinion filed (Fols. 235-264, reported 281 Fed. Rep. 111, Advance Sheets of Sept. 14, 1922).

No further steps were taken by the S. S. "SAO VICENTE" or the Transportes Maritimos do Estado.

However, one George S. Duarte, claiming to be the Portuguese Consul General at New York, petitioned this Court in March 1922 for a writ of *certiorari*, which was granted (257 U. S.). To this petition, there was attached no certificate of the Secretary of State of the United States to prove he official capacity of the petitioner, and none has yet been produced.

No appeal direct to this Court on the question of jurisdiction has been taken and the time to do so expired long ago.

Had sovereign ownership been properly raised at the outset of this case by official suggestion of our State Department or by special appearance or by any of the protective measures held by this Court in *"The Carlo Poma"* and *"The Pesaro"* to have been necessary, the many interesting questions raised by the appellant in its brief as to the jurisdiction of our Admiralty Courts *in rem* over Government property, used purely in a commercial enterprise, might well have had a place in this case. Under the present state of the record, they become academic. The question here is whether a Government—assuming the claimant here to be such—engaged in a commercial enterprise of private nature, can, any more than an individual, come into Court and accept the benefits of its appearance (release and use of this vessel), and then go out of Court at will, leaving the libelant without right or remedy. Such practice has been condemned by Mr. Justice McKenna speaking for this court in Porto Rico *vs.* Ramos 232 U. S. 627.

It would seem that the decision in this case must, in the final analysis, turn upon two points:

First—That, under the Judicial Code, Sections 128 and 238, and the decision of this Court in *"The*

Carlo Poma" (255 U. S. 219), the question raised is not reviewable in this Court by *certiorari*, but only by direct appeal:

Second—That coming into Court and procuring the release of the vessel, by substituting therefor the claim of owner and the private stipulation for value, was a submission to the jurisdiction of the Court and/or waiver or consent thereto, which cannot be withdrawn, and that the defense set up in the answer was not binding on the District Court, and did not oust it of the jurisdiction this acquired. *"The Pesaro"* 255 U. S. 216. Clark *vs.* Barnard 108 U. S. 436; Richardson *vs.* Fajardo Sugar Co., 241 U. S. 44.

Decision on appellee's motion in this court to dismiss this appeal was deferred until the present argument.

POINT I.

The jurisdictional question herein is not reviewable in this court by certiorari to the Circuit Court of Appeals.

United States Judicial Code, Sections 128 and 238;
"The Carlo Poma" 255 U. S. 219.

In the District Court, the question of jurisdiction to enter the interlocutory and final decrees and to condemn the vessel and its bail were squarely raised. While the answer contains a general denial as to amount, this amount was stipulated (Record, Fol. 62), and the question thus disposed of. That issue was not raised in the District Court, nor in the Circuit Court of Appeals (Fol. 107) by either the original or amended assignments of error. It cannot be raised here.

It is clear from the original and amended assignments of error (Record, Fols. 107 and 113-119) that the question of jurisdiction only was raised in the Circuit Court of Appeals, and equally clear from the petition and appellant's brief that that is the only question raised here. This question is of jurisdiction of the *res*, that is, the jurisdiction of the person as distinguished from the question of jurisdiction over the subject matter. The jurisdiction of the person is obtained by a Court by process or by voluntary appearance or consent. Jurisdiction of the subject matter cannot be conferred upon the Court by consent.

The argument of the appellant, advanced in its brief herein for the first time (Appellant's Brief, P. 11), that, because the subject matter of this suit relates to repairs to this vessel, which may be the property of a sovereign state, there is no jurisdiction over the subject matter, is untenable. Our Courts have uniformly recognized that foreign states, or the sovereign himself, might sue in our Courts on causes of action relating to public property of that sovereign or growing out of its use, thus conceding that there is jurisdiction of the subject matter.

> *Kingdom of Roumania* vs. *Guaranty Trust Co.* (C. C. A. Second Circuit), 250 Fed. Rep. 341;
> *Porto Rico* vs. *Ramos*, 232 U. S. 627;
> *Richardson* vs. *Fajardo Sugar Co.*, 241 U. S. 44.

If the fact of sovereign ownership of the property involved prevented a cause of action, over the subject matter of which the Court could not acquire jurisdiction, then, of course, the sovereign could not create such jurisdiction by consenting to come in and sue or be sued. The de-

cisions and the doctrine of international law, that a sovereign may be sued with its consent, would be meaningless. The result would be that a sovereign could never sue or be sued.

The difficulty with suits against a foreign state is, therefore, that the jurisdiction of the Court is subject to defeasance because of the possible assertion by the person of the sovereign that he is immune from the process of the Court. However, until that immunity is asserted and disposed of in one way or another, the Court has apparent jurisdiction. This must be asserted at the time that the Court attempts to subject him to its process.

Mighell vs. *Sultan of Johore* (Court of Appeals) L. R. 1894, 1 Q. B. D. 149.

If then asserted, the Court cannot proceed until the question is disposed of. It is contended by the appellee that in the present case the question was not raised at the outset, when the Court attempted to subject the property to its jurisdiction, and at no other time was it raised in the manner prescribed by this Court. Any question there might have been has been disposed of by the recognition of the jurisdiction of the Court and the releasing of the property upon the substitution of a bond therefor, all of which was done without protest or reservation or special appearance.

The appellant argues that the vessel seized was the property of a department of a foreign sovereign state, to wit, the Republic of Portugal, and thus the District Court, as a Court of Admiralty, could not, and did not, acquire jurisdiction over the vessel, irrespective of the general and not special appearance and the substitution of a surety company bond in the place of the vessel. This was decided adversely to the claimant by the

District Court. All other issues had been stipulated in libellant's favor, and the decree was final as between the parties.

The final decree of the District Court was entered a year ago and no appeal was taken direct to this Court as is required by the Statute. Instead, an appeal was taken to the Circuit Court of Appeals, which was dismissed, and then an application for *certiorari* was made to this Court, not by the claimant, but by a third party, one Duarte, individually, on behalf of the claimant, to review the decision of the Circuit Court of Appeals only.

This was no error of practice, as appellant would have us believe from his brief, for at the time of the argument before the District Court in the first instance, this Court had decided *"The Pesaro"* and *"The Carlo Poma,"* and these decisions were brought before the Court, *"The Pesaro"* being referred to in its opinion (Record Fol. 41). The method of the appeal was discussed by the appellant's proctor, and the final step of appealing to the Circuit Court of Appeals was apparently taken only after mature consideration and certainly only after most carefully preparing and its bill of assignments of error, and one month later its amended assignments.

Except for the injection of the individual, this is exactly the procedure which was condemned by this Court in *"The Carlo Poma,"* where it was specifically held that the decree was not reviewable in such manner, and the decree of the District Court was reinstated and enforced, this Court saying, among other things (225 U. S., at 220):

> "The question raised and decided in the District Court was whether, sitting as a court admiralty, it could entertain a suit *in rem*

against a ship such as the *Carlo Poma* was represented to be in the suggestion of the Italian Ambassador. That was a jurisdictional question in the sense of Section 238 of the Judicial Code. *The Pesaro, supra.*

From that decree an appeal did not lie to the Circuit Court of Appeals, but only to this Court. * * *

* * * * * *

As therefore the decree in the District Court was not open to review by the Circuit Court of Appeals, we must vacate the latter's decision and remand the case to it with a direction to dismiss the appeal."

See also

United States vs. *Beatty, et al.*, 232 U. S. 463.

The Circuit Court of Appeals was, therefore, correct in its decision granting the motion to dismiss this appeal, and this case must, therefore, be remanded to the Circuit Court of Appeals with a direction to issue its mandate dismissing the appeal.

POINT II.

The Suit is not against the Government of Portugal.

The appellant improperly treats this suit as one *in personam* against the Government of Portugal. This is not accurate.

This is a suit *in rem* against the steamship *Sao Vicente*. There is no dispute that this vessel was an unarmed merchant vessel operated in general trade on regular trans-atlantic routes, and in com-

petition with American shipping. It bore no governmental credentials, insignia or documents. It was carrying private cargo for hire. It was owned by an entity—Transportes Maritimos—and not by the Sovereign Government directly. The distinction was the same as in our own country where some boats were and are owned by the Emergency Fleet Corporation and others by the United States Government itself. The former could always be sued. The latter also when engaged in commercial business, such as the S. S. Sao Vincent was.

There is nothing in the separate defense pleaded denying this ownership separate and apart from the direct ownership of the government of Portugal. As used, the words "a department of" are merely words of description or identification.

The government of Portugal has not interested itself in this case. It has not officially come before the courts in relation to the property or the case. It has not requested our government to do so, or if it has the request has been denied, for our own government has not seen fit to make any representations in the case. The record does not account for such omission.

It affirmatively appears, we are informed, from the records now before the Court in the *in personam* suits of *De Simone* vs. *Transportes Maritimos do Estado* and *Maxwell Rose* vs. *the same* that the allegations in the libels there, to the effect that this Transportes Maritimos was a separate entity and a foreign corporation, are not, in fact, denied. In the *De Simone* case, there was a trial before the Circuit Judge, sitting in the District Court, on the issues, and no proof to the contrary was introduced by respondent.

A suit against a general merchant vessel is not necessarily a suit against the government whose flag it flies.

Smyth vs. *Ames*, 169 U. S. 466, 518;
Prout vs. *Starr*, 188 U. S. 537.

The claimant filed herein a surety company bond for value and substituted it in place of the S/S *Sao Vicente* and procured its release. Having substituted that in the place and stead of its property, it is now foreclosed from asserting a claim to exemption, or immunity, the bonds being those of a domestic private corporation.

The Luigi (D. C., E. D. Pa.) 230 Fed. Rep. 493.

POINT III.

The District Court obtained, and properly retained, jurisdiction over the steamship "Sao Vicente" herein.

The objection raised by appellant is one of privilege of the person or Government to decline to submit to the jurisdiction of the Court.

There is nothing in the doctrine of immunity of a Government which prevents a sovereign or Government from submitting itself or its property, public or private, to the adjudication of the Courts of another country.

There is no inherent objection to compelling a Government to come in and defend or prove title to non-public property not in its actual open possession in the absence of appearances clearly showing a right to exemption from jurisdiction, such as a public man-of-war.

"The Davis", 77 U. S. 15.

The doctrine is merely that the Courts of one Government will not assume the jurisdiction over

the Government of another country without its consent, and, of course, if the consent is given in any way, the case will proceed. Although a foreign sovereign may be immune to the jurisdiction, he is required to elect as to this submission when the Court seeks to subject him to its process.

Mighell vs. *Sultan of Johore*, L. R. 1894; 1 Q. B. D. 149.

Governments have frequently come into our Courts as litigants, both as plaintiffs and defendants.

The Kingdom of Roumania vs. *Guaranty Trust Co.* (C. C. A. Second Circuit), 250 Fed. Rep. 341;
Porto Rico vs. *Ramos*, 232 U. S. 627;
Clark vs. *Barnard*, 108 U. S. 436.

The only limitation is that the fact that a Government comes in to assert its own rights is not a general consent that claims may be asserted against it. It may, however, consent thereto. On consent once given, the proceedings against the Government may be carried to adjudication.

"The Davis", 77 U. S. 15;
Clark vs. *Barnard*, 108 U. S. 436;
Gunter vs. *Atlantic Coast Line*, 200 U. S. 273;
Richardson vs. *Fajardo Sugar Co.*, 241 U. S. 44.

When and how is the consent given? We have been able to find no authority for the proposition that it can only be by direct signature of the sovereign. It may be given in the same ways that other entities, such as non-resident corporations, can use.

It is difficult to find a clearer expression of consent to the jurisdiction over property alleged to be Government-owned than for the owner to come into Court as a private citizen and claim the property in the name of a private entity, substitute in its place a private surety company bond, withdraw the property and wait a considerable time before pleading to the suit, all without the remotest assertion or intimation of the claim to immunity or the Government ownership. This was the course followed in the present case, and has been held to give jurisdiction in—

"The Luigi", (D. C.) 230 Fed. Rep. 493;
"The Ucayali", (D. C. E. D. N. Y.) 159 Fed. Rep. 800;
Jones vs. ***Andrews,*** 10 Wall. 327.

In *"The Luigi"* case, the vessel was privately owned, but under requisition and orders and command of the Italian Government. Upon the arrest under process, a claim and stipulation for value, without protest, were filed and the vessel released. A suggestion of immunity was made by an attorney *amicus curiae,* and later by the United States Attorney at the instance of our own Government. The Court held, however, that by the substitution of the surety company bond it had lost jurisdiction of the *res,* and there was no interference with the Government, and retained jurisdiction. The Court said (p. 496)—

> "As the case now stands, therefore, the court possesses authority only over the obligors' bond, and none over the vessel. Nothing remains, therefore, through which, directly or indirectly, the court can exercise or attempt to exercise any authority to implead the Italian government in this suit. After the release of the Luigi, she was as to

> this suit as completely freed of any authority of this court as though she were upon her voyage across the Atlantic, or lying at her dock in an Italian port."

In *"The Ucayali"*, the libel was filed on January 12th, 1908, and a claim of owner and private stipulations for value and for costs were filed on January 31st, 1908, by the Booth Steamship Company, claimant. On February 5th, 1908, an answer was filed asserting lack of jurisdiction in the Court and the right of trial before the Consul exclusively. The Court there said—

> "The right to object to an assumption of jurisdiction by this Court seems to have been settled by the general appearance and answer on the part of the claimant."

In *Jones* vs. *Andrews,* the defendant was a non-resident not within the jurisdiction of the court. He filed a notice of appearance, coupled in the same document with a notice of motion to dismiss the bill, (1) for want of jurisdiction and (2) for want of equity. This court held that although this defendant might have had a privilege as a non-resident to refuse to submit to the jurisdiction and have saved that right by his first ground, *i. e.* questioning the jurisdiction, he waived it by the second ground which went to the merits and the document as a whole constituted a general appearance. The Court said, at page 332,

> "Whether, if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Cir-

cuit Court, dismissing the bill for want of jurisdiction, must be reversed."

See also

Atkins *vs.* The Disintegrating Co., 85 U. S. (18 Wall.) 272, 298.

And to the same effect—

"The statement of the case, which we have given shows that the defendants entered their appearance without reservation."

"The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a Court of the United States would be a voluntary submission to its jurisdiction;"

Clark *vs.* Barnard, 108 U. S., 436, 447,

"Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."

Gunter *vs.* Atlantic Coast Line, 200 U. S. 273, 284.

"The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, but the immunity of sovereignty from suit without its consent cannot be carried so far as to per-

mit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

Porto Rico *vs.* Ramos, 232 U. S. 627, 632.

"A reversal of the District Court's action is asked upon the theory that the proceeding is against Porto Rico, a government of sovereign attributes which has only consented to be sued in its own courts. Porto Rico *v.* Rosaly, 227 U. S. 270. Whatever might have been the merit of this position if promptly asserted and adhered to, we hold, following the principles announced in Porto Rico *v.* Ramos, 232 U. S. 627, that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction."

Richardson *vs.* Fajardo Sugar Co., 241 U. S. 44, 47.

It is thus clear, as was in fact expressly stated by this court in *Porto Rico* vs. *Ramos,* 232 U. S. 627, that there is nothing in the doctrine of immunity of the soverign which will permit it to come in and go out of court at will. The argument of the appellant herein is to accomplish exactly that and is untenable. It is not supported by the case relied upon, *Beers* vs. *Arkansas,* 61 U. S. 527. The clause in that case upon which he relies is clearly dictum by the court, and contrary to the direct decision of this court on the point in the later case of *Clark* vs. *Barnard,* 108 U. S. 436, when it was said, page 447:

"The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the ground that

> the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendement to the Constitution of the United States.
>
> We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; * * *" (P. 447).

The decisions of the Supreme Court of New York in *De Simone* vs. *Transportes Maritimos,* referred to in appendices A and B (pages 27, 33) of appellant's brief are not in point herein as they raise interlocutory questions of pleading under the peculiar provisions of the New York Code of Civil Procedure. The case did not go to the highest court of the State and the issue has not been finally determined in that action itself.

In those cases relied upon by the appellant, in which the claim of sovereignty has been sustained, the question has been raised, not by a claim or answer verified by the Consul alone, but by the intervention of the official diplomatic representative of the Government itself after special appearance made at the outset of the suit, or, in the absence of any appearance by the Government sued, then by the special request by the State Department of the Government in its own Courts. This is so even in *"The parlement Belge"* (L. R. 5 P. D. 197) and *"The Exchange"* (7 Cranch. 116), so strongly relied upon by the appellant. See also—

Ex Parte Muir, 254 U. S. 522;
The Pesaro, 255 U. S. 216;

The Carlo Poma, 255 U. S. 219;
The Roseric, 254 Fed. Rep. 154;
The Maipo, 252 Fed. Rep. 627;
The Attualita, 238 Fed. Rep. 909;
Kingdom of Roumania vs. *Guaranty Trust Co.*, 250 Fed. Rep. 341.
In re Hussein Lutfi Bey, 256 U. S. 616;

This Court has repeatedly prescribed the necessity for claiming immunity at the outset through the official channels and the method of so doing.

"The Lake Monroe", 250 U. S. 246.
"The Pesaro", 255 U. S. 216;
"The Carlo Poma", 255 U. S. 219;
Ex parte Muir, 254 U. S. 522;

The case of *"The Exchange"* (7 Cranch 116) is much relied upon by the appellant, but in that case the schooner was an armed man-of-war, flying the French flag,—obviously public in character and capable only of public service. Even here, there was a special appearance at the outset by the United States Attorney, acting on behalf of the State Department of our Government, claiming the immunity for the vessel through recognition of the Government ownership, as such. That this Court had in mind a distinction between war vessels and other property, specifically appropriated to a public use, and similar property engaged in competitive private business enterprise, is apparent from the following portions of the opinion in that case (p. 144)—

> "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the pur-

poses of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

* * * * * *

A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern."

It is extremely doubtful whether the claim for immunity could have been sustained herein had it been properly suggested at the outset. There must be government ownership and possession of the *res*. See *The Davis*, 77 U. S. (10 Wall) 15 where personal property of the United States on board a vessel was held liable for a lien for salvage service, which lien could be enforced against it while on board, the government being thus compelled to appear in court and satisfy such lien to retain its property.

Privilege as public property exists only so long as the property is specifically appropriated to national objects.

U. S. vs. *Thompson* (U. S. Sup. Ct.), Jan. 3, 1922, not yet reported;
Buchanan vs. *Alexander*, 4 How. 20.

And thus the admittedly private use of this vessel must be held to have taken away the public privileges, just as embarkation upon private business takes away from a Consul the personal privileges and immunities which he may enjoy as Consul under treaties.

None of the steps prescribed have been taken in this case. On the contrary, the *appellant has appeared generally*, released its property from attachment, substituted in its place the bond of a domestic surety company, and then, after a long delay, set up the allegation in an answer filed by its attorneys. At no time up to the present moment did the official diplomatic representative of Portugal or the Executive Department of our own Government, file a suggestion or a request in the case. The only steps taken by appellant were those attempted in the answer verified by the Acting-Consul General at the Port of New York, which is obviously not a compliance with the requirements laid down in either of the above-named cases.

Assertions of this kind by foreign Consuls, unsupported by the intervention of duly accredited diplomatic representatives of their country or of the State Department of our own country, cannot be received as binding upon our Courts,

"The Pesaro," 255 U. S. 216;

for Consuls are not ambassadors or ministers

5 *Moore's Digest of International Law*, Section 702,

and suggestions by them are not entitled to any more weight than those of private parties or private proctors submitting them *amicus curiae*—

Ex Parte Muir, 254 U. S. 522;
Ex Parte State of New York No. 2, 256 U. S. 503, 510.

It must be admitted that the appearance in this case was general. It has never been withdrawn or amended. The appellant contends that the general appearance should be treated as a nullity. The effect of a general appearance at the outset of a litigation is a consent to submit the party so appearing to the jurisdiction of the Court. The party is thereafter estopped from setting up immunity or want of jurisdiction of his person. Jurisdiction once acquired will be maintained.

United States vs. *New York and Oriental Steamship Co., Limited*, C. C. A. Second Circuit, 216 Fed. Rep. 61, 68.

POINT IV.

Appellants Exhibit "1", submitted with his brief, should be disregarded.

The appellant has attempted to inject into this case certain facts and documents, not in the record, by annexing to his brief an extended transcript of a certain commission isused in a suit now pending in the District Court for the Southern District of New York, entitled—"*Mattes* vs. *Transportes Maritimos do Estado*,"—wherein the same claimant appears as respondent *in personam*. This step is improper and the document should be disregarded. An objection thereto was promptly served upon appellant's proctor

together with a notice that a motion would be made upon this argument to strike the said document from the record. The translation there set forth was made not by an official interpreter of this Court, but by some one unknown to this appellee. The commission contained therein is incomplete, in that several cross-interrogatories are omitted. The examination is not of value in this case, nor binding upon the parties hereto, for the reason that they had no notice thereof, and were not permitted to take part or examine on issues material to the present suit. Furthermore, the case referred to has not been tried and is still pending on the Calendars undetermined. Whether the testimony referred to is admissible and will be proved or disproved has not yet been passed upon.

Exhibit "1," therefore, should be disregarded and struck from the record, and no reference has been made thereto in this brief.

LAST POINT.

The District Court was right in retaining jurisdiction and entering its decrees. The Circuit Court of Appeals was correct in dismissing the appeal.

The decree of the Circuit Court of Appeals dismissing the appeal from the District Court should be affirmed, and the decree of the District Court be affirmed.

Respectfully submitted,

E. Curtis Rouse,
Counsel for Tietjen &
Lang Dry Dock Company,
Libellant-Appellee.

E. Curtis Rouse,
J. Dexter Crowell.

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Supreme Court of the United States

OCTOBER TERM, 1922.

THOMAS DESIMONE, Libelant-Appellee, against Steamship "MURMUGAO," her engines, etc., Claimant-Appellant.	Nos. 282-283.
THOMAS DESIMONE, Libelant-Appellee, against TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.	

BRIEF FOR APPELLEE THOMAS DeSIMONE.

Statement of Facts.

Thomas DeSimone, a ship chandler, doing business in New York City, provisioned the steamship Murmugao on the 19th day of August, 1920, at the request of persons in charge of the ship. He furnished this vessel with merchandise of the agreed price and reasonable value of $23,717.04, to en-

able her to clear, make her voyage, discharge and load her cargo. Officers of the vessel receipted for the merchandise and she left port without paying the bill.

On August 27, 1920, he similarly provisioned the steamship Santo Antao with merchandise of the agreed price and reasonable value of $7,987.18, and on the 1st day of September, 1920, he furnished the steamship Cunene with merchandise of the agreed price and reasonable value of $8,567.32.

These three vessels were owned and operated by the Transportes Maritimos Do Estado.

When the Murmugao came back to the Port of New York, in December, 1920, she was arrested upon process issued by the District Court of the United States for the Southern District of New York, upon a libel *in rem* and a libel *in personam*, both by Thomas DeSimone, and upon libels of the other libelants. The libel in DeSimone's suit *in rem* was brought for the recovery of $23,717.04 interest and costs, for the provisions furnished to that ship. The libel *in personam* set forth that the Transportes Maritimos Do Estado was a foreign corporation, organized under the laws of Portugal, and the owner of the steamship Murmugao, and prayed for the recovery of $16,554.50, for the merchandise sold to the Cunene and the Santo Antao, both owned by that company.

On December 13, 1920, Frank M. Patterson, Esq., filed with the Clerk of the District Court a notice that he appeared for the ship and the Transportes Maritimos Do Estado and filed stipulations for value and thus secured the release of the vessel.

In neither the stipulations for value nor the notice of appearance was any claim made reserving

any rights on the question of jurisdiction. The appearance was general and in nowise limited.

To these libels, on December 24, 1920, answers were interposed. The answers to both libels are substantially the same and each of them was verified by Joseph Roca Prista, the Acting Consul General for the Government of Portugal at the City of New York. The answers admitted the ownership of the vessels in the Transportes Maritimos Do Estado; admitted the sale and delivery of certain merchandise, but they undertook to deny the other material allegations of the libel; and by way of separate defense, in both cases, it was asserted that the ships in question were the property of the Transportes Maritimos Do Estado, a department of the Government of Portugal, and that they were owned and operated by such Government and therefore the Court was without jurisdiction.

It should be noted at this time that there is no *affirmative allegation in the answer in the action in personam that the Transportes Maritimos Do Estado is not a foreign corporation. It should also be noted that there is no claim in the answer that the ships were devoted in anywise to the public uses of the Government of Portugal; nor is there an allegation or averment in the answer that these vessels were other than merchant vessels, engaged in ordinary commerce and trade.*

Exceptions were filed by the libelant to the sufficiency of the defenses in the answer, and they were brought on for argument before Manton, J., who denied the libelant's application to sustain the exceptions, in a written opinion, which may be found at page 46 of the appellant's brief.

Subsequently, the cases came on for trial before Manton, J. Libelant offered proof of the sale and

delivery of the merchandise. *The claimant and respondent cross-examined libelant in detail as to the merits,* and then, after the libelant had completed his *prima facie* cases in both suits, counsel for the claimant and respondent sought a postponement to prove that the vessels were owned and operated by the Portuguese Government. He asserted that he rested solely upon the defenses stated in the answer; that he had no evidence to contest the claims of the libelant on the merits, and the Court thereupon made the following decision:

> "I think I will give a decree for the libellant in the case of De Simone vs. S. S. Mormugao for the amount in full, with interest, amounting to $25,503.73, and I will grant a decree against the corporation for the full amount of $17,775.62. The Court finds it in that way rather than to send this matter to a commissioner to take proof as to the damage. *The respondent, after having appeared and answered generally, cannot avail itself of that part of the answer which sets up the special defence of sovereignty in the ownership and operation of the vessels.* We might have stricken out that part of the answer and sent the matter to a master to ascertain the damages, but in view of the fact that the libellant has been deprived of what unquestionably is his, the full amount here awarded to him, he should not be further delayed, but is entitled to a decree. This is particularly the case in view of counsel's admission that he cannot and will not contest the delivery of the goods or the amount which is claimed to be due and owing him. Decree may be presented accordingly.
>
> I decline to further postpone because the proof which counsel for the respondent suggests he would offer from the Portuguese

> Consul would not change the result, as long as *I hold that the defence of sovereignty ownership is not available at this time to either of the respondents.*"

There are thus presented to this Court the following questions:

1. Did the Transportes Maritimos Do Estado by appearing generally in these suits, filing stipulations for value, securing the release of the vessel upon such stipulations, *participating in the trial on the merits,* waive the right to claim immunity, if any exists, on the ground that the action, in effect, is directed against a foreign sovereignty?

2. Assuming that the vessels are owned by the foreign sovereignty, through an agency employed by it for that purpose, does any immunity exist, in the absence of an averment or allegation in the answer that the vessels were employed at the time of the sale of the merchandise as a public ship, exclusively engaged in the performance of national functions? In other words, is a public ship, used for trading purposes, entitled to claim immunity from arrest; or is a foreign government, engaged in ordinary commerce and trade, immune from jurisdiction of our courts in matters arising out of such commercial enterprises?

POINT I.

The voluntary appearance of the claimant and respondent, the filing of stipulations for value, the procurement of the release of the vessel, the cross-examination by counsel of libelant, and the trial of the case on the merits is a complete waiver of the right to question the jurisdiction of the court of the person of the claimant and respondent and of the claim to be immune from process.

It is axiomatic that, where the court has jurisdiction of the subject-matter, jurisdiction of the person may be conferred by consent.

Whyte v. *Gibbes*, 20 How. (61 U. S.), 541.

Accordingly, it has been held that, where a party appears generally in an action, he waives all objection to the jurisdiction of the court of his person.

Pennoyer v. *Neff*, 95 U. S., 714.
U. S. v. *N. Y. & O. S. S. R. R. Co., Ltd.*, 216 Fed., 61.

And this rule is equally applicable to causes in admiralty.

Atkins v. *The Disintegrating Co.*, 85 U. S. (18 Wallace), 272.

In the latter case, Mr. Justice Swayne, in deciding that the court had jurisdiction of the person of the defendant, *in personam*, thus gave his opinion at page 298:

> "The statement of the case, which we have given, shows that the defendants entered their appearance without reservation. If there could be any doubt upon the subject it is removed by their repeated subsequent recognitions of the fact. This made their position just what it would have been if they had been brought in regularly by the service of process. *In this aspect of the case all defects were cured and the jurisdiction of the court over their persons became complete* (Pollard v. Dwight, 4 Cranch, 421; Knox v. Summers, 3 Id. 496). This warranted the decree *in personam* for the amount adjudged to the libellants."

What is the nature of this so-called immunity claimed by the claimant and respondent, is the pertinent inquiry. Is the immunity such as deprives the court of jurisdiction of the subject-matter, or is it such as affects the court's jurisdiction of the person of the claimant and respondent?

If it is the former, it cannot be denied that if the immunity does exist—which is here earnestly disputed—then it may be raised at any stage of the proceedings, whether pleaded in the answer or otherwise. If, on the other hand, it affects the question of the jurisdiction of the person of the claimant and respondent, did not its general appearance, filing of bond and securing the release of the vessel thereunder, the filing of an answer denying the allegations concerning the merits of the complaint, participation in the trial, and the cross-examining of witnesses of libelant, effectually bar that right? The practice is well established and long recognized that where a party is proceeded against in any court and desires to question the jurisdiction of the court over his person, he may do so by special

appearance for that purpose only, and where he appears generally whether reserving that question in his answer or otherwise, he cannot be heard to deny the jurisdiction of the court over his person.

Rhode Island v. *Massachusetts,* 37 U. S. (12 Peters), 657.
Clark v. *Barnard,* 108 U. S., 436.
Reed v. *Chilson,* 142 N. Y., 152.
Meyers v. *American Locomotive Co.,* 201 N. Y., 163.
Grant v. *Birrell,* 35 Misc. (N. Y.), 768.
Freeman v. *Freeman,* 126 App. Div. (N. Y.), 601.
Smith v. *First National Bank,* 103 Misc. (N. Y.), 274.
Benedict on Admiralty, 4th Ed., p. 215.
Prankard v. *Deacle,* 1 Hag. Ecc., 185.
The Girolamo, 3 Hag. Ad. R., 173.
The Gladiator, Id. 340.
The Eliza Jane, Id. 337.
The Protector, 1 W. Rob., 62.
The Alexander, Id. 293.
The Sarah Jane, 7 Jur., 659.
Taylor v. *Morley,* 1 Curteis, 481.
The Bee, Ware, 332.

Of course, if the plea relates to the subject-matter, it may be raised at any time. It follows that the question to be here determined is whether or not the immunity claim is such as affects the subject-matter or the person of the defendant, and if it does affect the person of the defendant, whether the general appearance is a consent to the assumption of jurisdiction.

In this country the principle is well established that foreign sovereigns are privileged from all process issuing out of our courts and immune from their jurisdiction with respect to matters affecting them in their public functions.

The Exchange, 7 Cranch., 116.

Whether a sovereign enjoys such immunity with respect to controversies arising out of transactions in which it is not engaged in its public capacity but rather as a private individual, such as transactions relating to commerce and trade, is a question that is still open for debate, as is indicated by this court in *Matter of Hussein Lufti Beydender,* June 6, 1921, 41 Sup. Ct. Rep., 609; *The State of New York* v. *The Queen City,* decided June 1, 1921, *id.,* p. 592. Likewise, it is well settled that the domestic sovereigns, the United States of America or any State of the Union, is likewise immune from the jurisdiction of their own courts.

Carr v. *The United States,* 98 U. S., 433.
Stanley v. *Schwalby,* 162 U. S., 255.
People v. *Dennison,* 84 N. Y., 272.

The so-called immunity accorded a foreign sovereignty, while similar to the immunity granted to the United States or any other State or Territory of the Union, does not spring from the same source. The latter is a development of international law, the result of the delicate relations affecting nation and nation, while the former finds its root in the common law of England.

United States v. *Lee,* 106 U. S., 196.

This distinction is not unimportant, nor must it be lost sight of.

Appellant urges that there can be no implied waiver by a general appearance by an attorney or proctor, under Point IV of its brief, citing, among others, *Carr* v. *United States,* 98 U. S., 432; *People* v. *Dennison,* 84 N. Y., 272; *Stanley* v. *Schwalby,* 147 U. S., 508, and other cases which manifestly have no application.

It is true, as announced in the cases cited, that a domestic sovereign does not by the general appearance of any of its officers or agents waive the right to claim immunity from suit. This because, as Mr. Justice Miller in *United States* v. *Lee,* points out, *supra:*

> "The King of England is not suable in the courts of that country, except 'where his consent has been given on petition of right.' * * * There is in this country no such thing as a petition of right, as there is no such thing as a kingly head to the nation or any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued, except in the law making power which may give such a consent on terms it may choose to impose. (The Davis, 10 Wall. 15.)"

Hence it follows that the officers of a state undertaking to appear in an action brought against it cannot vest the court with jurisdiction, unless a statute can be found granting this privilege to the litigant. On the other hand, the foreign sovereign does not stand upon an equal footing. Should he undertake to appear in an action and answer to

the merits, he may not thereafter withdraw without the consent of the court.

Rhode Island v. *Massachusetts,* 37 U. S. (12 Peters), 657.
Clark v. *Barnard,* 108 U. S., 436,

quoted with approval in:

Gunter v. *Atlantic Coast Line R. R. Co.,* 200 U. S., 273.
Porto Rico v. *Ramos,* 232 U. S., 627.
Porto Rico v. *Rosaly,* 227 U. S., 270.
Richardson v. *Fajardo Sugar Co.,* 241 U. S., 44.
Veitia v. *Fortuno Estate,* 240 Fed., 256.

In the case of *Clark* v. *Barnard,* 108 U. S., 436, quoted with approval in *Gunter* v. *Atlantic Coast Line Railroad Co.,* 200 U. S., 273, an action was brought by the assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company against Samuel Clark, General Treasurer of the State of Rhode Island, the City of Boston and Fred U. Tracy, its Treasurer. Clark filed a demurrer for want of jurisdiction on the ground that it was in substance a suit by the citizens of one state against the State of Rhode Island. The demurrer was overruled. Clark then filed his answer denying the material allegations of the bill and asserting that the transaction was with the State of Rhode Island, through its treasurer in his official capacity.

The case then proceeded to trial. The Supreme Court, by Matthews, J., then said in respect to this question:

"The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, General Treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against the State by citizens of another state, contrary to the eleventh amendment to the Constitution of the United States. We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in Court. *The immunity from suit belonging to a state, which is respected and protected by a Constitution within the limits of a judicial power of the United States, is a personal privilege which it may waive at pleasure;* so that in a suit, otherwise well brought, in which a state had sufficient interests to entitle it to become a party defendant, *its appearance in a Court of the United States would be a voluntary submission to its jurisdiction;* while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceedings became one in the nature of an interpleader in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U. S. 462 (1 Sup. Ct. Rep. 363), where the state expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the Court. The circumstance

> that the appearance of the State was entered without prejudice to the demurrer of Clark, the General Treasurer, does not affect the result. For that demurrer could not reach beyond the question of the right to sue Clark by reason of his official character, which became insignificant when the state made itself a party; and in point of fact the bill was framed to avoid the objection, by charging Clark as a wrong-doer in his individual capacity."

In the case of *Porto Rico* v. *Ramos, supra,* the State of Porto Rico petitioned to be made a party to the action, being granted leave to file a demurrer. The application being granted, the State of Porto Rico thereupon demurred, on the ground that Porto Rico being a sovereignty the court had no jurisdiction. The demurrer being overruled, it filed an answer denying the material allegations of the complaint, and setting up by way of affirmative defense that it had such attributes of sovereignty as exempted it from suit. The case came on for trial, and a verdict rendered against the defendant. The Supreme Court of the United States thus wrote:

> "The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view, but the immunity of a sovereign from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of Court at its will; the other party having no right of resistance to either step."

In every one of the English cases cited by the appellant as authority for the proposition that the sovereign is immune from suit, there was either a

special appearance or a special protest to the jurisdiction of the court and no general appearance, with the exception of the following cases: *The Jassy,* Probate (1906), 270, and *Vavasseur* v. *Krupp,* L. R. 9 Chancery Division, 351.

These two cases require special consideration.

To digress for a moment, it may be pointed out at this time that the English courts have undoubtedly held that a sovereign is immune from jurisdiction whether the matter arises out of a public or a private transaction. But we shall take the liberty of commenting further upon these authorities below.

In the case of *The Jassy, supra,* the vessel was arrested at Liverpool, but was released upon a bond given by a firm of solicitors under instructions from the Liverpool agents of the ship. Thereafter an appearance was entered on behalf of the agents of the ship by the London solicitors of the same firm of agents. Some time later these London agents wrote to the plaintiff's solicitors informing them that the Jassy was owned by the Roumanian Government, and suggesting that the plaintiff withdraw from further prosecution of the action, but this the plaintiff declined to do. Following this event, the Charge d'Affairs of the Roumanian Government addressed a letter in the nature of a certificate to the Secretary of State of Foreign Affairs, pointing out that the ship was a public vessel of the Roumanian Government, owned and worked by the state for its public purposes, including carrying of mail, passengers and cargo, in connection with the national railways of that country, and *that appearance and bail was given under a misapprehension on the part of the local agents to secure her immediate release and without the consent*

or authority of the Roumanian Government, and when the facts were drawn to the attention of his Government he was instructed to intervene. Copy of the letter was forwarded by the Secretary for Foreign Affairs to the court, and application made to dismiss. Counsel for the plaintiff argued that the appearance was general and thus unlike the cases where the immunity was held to exist. The presiding judge, on the other hand, *held that since the appearance was unauthorized the action should be dismissed.*

The inference is thus clear that, had there been no suggestion of lack of authority on the part of the agent or solicitors to enter a general appearance, a contrary rule would have been adopted.

In the case of *Vavasseur* v. *Krupp, supra,* plaintiff brought an action against Krupp, of Essen, Germany, and another, his local agents, as well as the agents of the Government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. He asserted that shells had been brought into England and landed there to be put on board of three ships of war belonging to the Government of Japan which were then being built in England. The injunction was issued without prejudice to the merits of the case, restraining any person from parting with or selling or disposing of the shells or projectiles during the pendency of the action. The Mikado of Japan and his Envoy Extraordinary in England thereupon made application to be added as defendants in the action, and asked that the injunction be dissolved and the Mikido given liberty to take possession of this ammunition and remove them out of the jurisdiction

of the court. It was argued that the Mikado by making himself a party defendant in the suit had submitted himself to the jurisdiction of the court, and the injunction should therefore be continued pending the final determination of the action. The court below granting the Mikado the right to remove the shells out of the country did not pass squarely upon this question. Three opinions were rendered on appeal. James, L. J., held that the submission to the jurisdiction was not intended to be general, but was for a special purpose only, that is, to secure the removal of the property. Brett, L. J., took the position that on the merits the entire action was not maintainable because the property belonged to a foreign sovereign, and did not pass on the merits. Cotton, L. J., acquiescing in this view, held that the appearance was conditional only.

In the case at bar no claim has been made that the appearance by counsel has been unauthorized, and no attempt was made before the action came to trial to withdraw the general appearance. Indeed, counsel undertook to examine the witnesses for the libelant, and participated in the trial on the merits. There is not a suggestion in the so-called affirmative defense in the answer that Mr. Frank M. Patterson was not authorized to appear generally.

If the subject of immunity were one which affected jurisdiction of the subject-matter, then, of course, it would have been quite proper to set this fact up by way of affirmative defense, or, indeed, it would not have been necessary at all to make such an affirmative plea, for the question could be raised at any stage of the proceedings whether pleaded or otherwise. But is the matter one that

affects the jurisdiction of the subject-matter? The fact that a sovereign can submit to the court a controversy, should it choose to do so, indicates clearly that it relates to jurisdiction of the person, because otherwise its consent to litigate would be a nullity.

In the case of *Manning* v. *State of Nicaragua,* 14 How. Pr. (N. Y.), 517, the State of Nicaragua was made a party defendant to a suit. A co-defendant demurred on the ground that the State of Nicaragua was evidently a sovereign and could not be sued in courts of another state. The court thus wrote (pp. 517-519):

> "Undoubtedly, a sovereign, or a sovereign state, in their political capacity, cannot be sued in the courts of another state or nation for the purpose of enforcing any remedy against them. In short, they are not subject to the coercive power of any judicial tribunal, except where they may have expressly consented, as by treaty (a possible case), or like the sovereign states of this confederation, by a federal compact, for the purpose of forming 'a more perfect union.' But cannot a state be made a defendant in an action for the purpose of giving it an opportunity to appear, and thus to enable a court to decide more intelligently and equitably in relation to demands which are sought to be enforced against other defendants? There is nothing necessarily derogatory to the character or independence of a state to be mentioned merely as defendants conjointly with others in an action. The joinder may amount to nothing more than an invitation to appear by their representatives or agents, and it may be their desire to accept the invitation if they consider that their appearance would be conducive to jus-

tice or to their own interests. States, as well as individuals, it may be presumed as a general rule, are the best judges of what affects their own dignity and advantage, and it may be safely left to their own sovereign option to determine whether they shall take part or not in any judicial controversy, not for the purpose of submitting themselves to the coercive power of the court, but, as I have said, for the purpose of enabling it to arrive at a correct and satisfactory determination. If then the mere joinder of a state in a civil action is no derogation from its dignity, or infringement of its sovereignty, the action is not on that account necessarily and inevitably untenable, and a demurrer to the complaint on that ground cannot be maintained. The objection upon which it is founded is at least premature.

The appearance indeed of the state cannot be enforced any more than a judgment against it; and if it should not voluntarily appear, the court may or may not be able to adjust or determine the ultimate rights of the other parties. If it should find itself incapable of doing this, in consequence of not being able to adjudicate against the other defendants, without being able to adjudicate also against the state, it will, as a matter of necessity, dismiss the action. But evidently it cannot be ascertained until the hearing whether the state shall exercise its option to appear, or whether the final adjudication can be properly made without its appearance, and, consequently, if my position that the state may or may not appear at its option is correct, the objection presented by the Accessory Transit Company cannot be entertained in this form, or at this stage of the action."

If the State of Nicaragua had appeared in the action and pleaded to the merits, it must follow that its immunity would have been waived. It would be most unjust to hold that, notwithstanding its appearance and hearing on the merits, it could then shield itself by asserting its immunity.

A defense in an answer, in our system of pleading, can have no relation to the defect in the process, and its office is clearly to dispose of the right to maintain the cause of action and to destroy what would otherwise be the merit of the claim of the party complaining. The so-called defense in the answer here has no such purpose. It asserts an immunity from the process of the court, and the claim that the respondent cannot be drawn into litigation. If such right does exist, it should be asserted before answer on the merits or participation in the trial, by way of special appearance or motion. To permit anyone to delve into the merits and then escape the judgment of the court seems to be repugnant to our methods of administering justice.

Reliance is placed on the case of *DeSimone* v. *Transportes Maritimos Do Estado,* 200 App. Div. (N. Y.), 182, as authority for the proposition, first, that it was proper to raise the defense in an answer because it affected the jurisdiction of the subject-matter and not of the person, and, second, that the general appearance was not and could not be held to be a waiver of the right to claim this immunity.

It is necessary to analyze the decision of that court to determine whether or not its reasoning is correct. Simultaneously with the filing of the libel, DeSimone sued the Transportes Maritimos Do Estado in the Supreme Court of the State of New

York. By its counsel, Frank M. Patterson, it interposed an answer, containing a number of defenses, namely, the plea that the admiralty suit at bar was then pending and, again, the plea of immunity.

It is necessary to observe, as the court will find at page 29 of the appellant's brief, that the answer in that case, unlike the answer in the case at bar, contained the following allegation:

> "That the steamships Murmagoa, Santa Anteo and Cunene are Portuguese vessels, flying the flag of Portugal, owned and operated by the Government, and *engaged in the public service of Portugal.*"

There is no allegation in the answer here that the ships were engaged in the public service of Portugal.

A demurrer was interposed to the answer, on the ground that it was insufficient in law upon the face thereof, plaintiff's contention being that the answer was a general appearance, and that defense was therefore waived.

In its first opinion the court held that the answer was not equivalent to a general appearance but it amounted to a special appearance, and in any case amounted to a claim withdrawing the consent to litigate on the merits, which the answer might otherwise have given. The court supported its ruling by citing *Sweet* v. *Tuttle,* 14 N. Y., 465, and *Hamburger* v. *Baker,* 35 Hun (N. Y.), 455.

When the Circuit Court of Appeals had rendered its opinion in the case at bar, deciding directly contrary to the Appellate Division, an application was made to the Appellate Division for a reargument.

We pointed out that the court had fallen into error, because under the Code of Civil Procedure of New York, Section 421, now Section 237 of the Civil Practice Act, the answer amounts to a general appearance, and the case of *Hamburger* v. *Baker* was directly disapproved in the case of *Reed* v. *Chilson*, 16 N. Y. Supp., 744, where the court wrote as follows:

> "So much time would not have been occupied on this subject but for the case of Hamburger v. Baker, 35 Hun, 455, in which it is held that, where the defendant appears generally by answer, he may still raise the question of jurisdiction. In that case the appearance was made by the service of an answer, which the Code says is a general appearance. It differs from the two cases last cited for the reason that in those cases the answer denying the jurisdiction was served some time after the notice of retainer. But I do not think that difference affects the principle. The appearance consists in the service of the answer, and the contents of the answer cannot change the effect produced by its service which is prescribed by the Code. It will be noticed that the Hamburger case pays no attention to section 424 of the Code. No cases are cited to sustain the decision. I have looked carefully, and can find but two in which the precise question was presented, and in each of those cases the decision was just the other way from that in the Hamburger case. Olcott v. MacLean, 73 N. Y. 223; Carroll v. Lee, 22 Amer. Dec. 350. In the case of Wheelock v. Lee, and the others cited above, in which the objection to the jurisdiction was sustained after the entry of a general appearance, the ruling was put upon the ground that the want of jurisdiction was not because the defendants were

> not properly in court, but because the court had no power to determine the matter submitted to it. In each of those cases it was assumed that if there had been jurisdiction over the subject-matter, the appearance would have given complete power over the person, notwithstanding the plea. *I do not think the case of Hamburger* v. *Baker was correctly decided, and it should not be followed. My conclusion is that the court has jurisdiction of this action. The defense of a former judgment in this state is not available, for the reason that there was clearly no jurisdiction to render it.*"

It will be noted that in that case the court pointed out that the answer was equivalent to a general appearance, and directly contrary to the holding of *Hamburger* v. *Baker*. The attention of the Appellate Division was further directed to the fact that the decision of the court in *Reed* v. *Chilson, supra*, was reviewed by the Court of Appeals, 142 N. Y., 152, the court writing its own opinion, as follows:

> "It is urged that the defendants were obliged to appear and present the facts to the court or suffer default, and, therefore, the appearance was not voluntary. This does not change the effect of the appearance. *When a party does not intend to subject himself to the jurisdiction of the court he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own*

act. But if the defendant elects to come before the court and there try the questions, he cannot afterwards deny the jurisdiction, or be heard to claim that it was not a voluntary appearance. The court had jurisdiction of the subject of the action."

Thus, while *Hamburger* v. *Baker* was not expressly overruled, by fair implication its authority as a valid legal precedent was completely negatived. In its opinion on reargument, the Appellate Division further elaborately reconsidered the question of the immunity of a sovereign and adhered to its former decision, stating: "In the Hamburger case, and in the case at bar, no notice of appearance was served, but the appearance was effected by the service of an answer, and maintaining that the answer in the case at bar was equivalent to a special appearance." This despite the fact that the attention of the court was called to the fact that a general notice of appearance had been served before the answer was interposed, as in the case at bar, and also to the case of *Grant* v. *Birrell,* 35 Misc. (N. Y.), 768, where the court wrote:

"A defendant who voluntarily appears and answers, though the answer in terms reserves the right to object to the jurisdiction of the court, is precluded from objecting that the court did not acquire jurisdiction of his person. Mahaney v. Penman (Hoffman, J., concurred in by Oakley, C. J., and Duer, J.), 4 Duer, 603. A notice of appearance after a denial of a motion to set aside service of a summons upon a defendant who was served while a witness gives the court general jurisdiction of the person. Woodruff v. Austin, 16 Misc. Rep. 543, 38 N. Y. Supp. 787. A general appearance gives jur-

> isdiction even where there was no property in the state, and defendant was served only by publication. Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Christal v. Kelly, 88 N. Y. 286."

The court, finding its position weakened on the application for reargument by these prior decisions, went on to advance the proposition that the defense did not only relate to the person of the defendant but to the subject-matter of the action as well. Of course, if it actually did relate to the subject-matter, then whether the general appearance constituted a submission to the jurisdiction or not would have become quite academic. It is interesting to note, however, the court's observation that the action for goods sold and delivered would ordinarily come within the court's jurisdiction, but it went on to say:

> "It is more than this, it is to recover for goods sold and delivered to a foreign sovereignty of which the court does not, and cannot have jurisdiction except with its consent. In the case of The Parlement Belge (supra) (page 220) the Court said: 'It has been held that an ambassador cannot be personally sued, although he has traded, and in both cases because such suit would be inconsistent with the independence and equality of the state which he represents.' "

We shall hereafter demonstrate that while this may be the rule in England it is unjust, unscientific and should not be established as a valid principle in this country.

The Appellate Division of the New York Supreme Court held that the sovereignty of a state of the Union is not like the sovereignty of an independent

nation, and while it is true, acquiescing in the rule that a state may waive its immunity from suit in the federal court by a general appearance and answer, a foreign sovereignty cannot be so treated, because to do so might give rise to a *causus belli*. We do not share in that court's apprehension in that regard. If a state or foreign sovereignty inadvertently or under a misapprehension causes its representative to appear generally and plead to the merits, or should the counsel without authority undertake to appear in a litigation and thus consent to the jurisdiction of the court, the sovereignty is not without redress. It need not go to war to protect its rights. Certainly the court has the power to permit it to withdraw its general appearance, upon proof that its counsel acted without authority or that the appearance was by inadvertence.

State of Rhode Island v. *State of Massachusetts*, 12 Peters, 657,

where the court gave permission to the State of Massachusetts to withdraw its general appearance, if it was so advised, holding that it had jurisdiction of the subject-matter.

See also *The Jassy, supra.*

No request was made here before trial on the merits or at any other time to withdraw the answer or the general appearance.

POINT II.

The claimant and respondent below is entitled to no immunity ordinarily accorded to a sovereign, it having waived that privilege by engaging in commerce and trade.

The answer of the appellant in the case at bar contains no affirmative allegations that its ships were engaged in the public service of the Government of Portugal and were not merchantmen. Indeed, the deposition submitted by the appellant, as Exhibit I, conclusively establishes the fact that the Transportes Maritimos Do Estado was an agency established by the Portuguese Government, similar to our Shipping Board Emergency Fleet Corporation, to engage in the ordinary pursuits of a mercantile marine and as merchant vessels and as common carriers for hire. It cannot be claimed, of course, that the deposition is in anywise binding on the appellee in this court. Had we been permitted to participate in the taking of this deposition, there are many pertinent inquiries that might have been made of the head of this agency. For instance, it would be interesting to know whether or not the ships were manned by ordinary seamen or by naval officers. It is important to inquire how much of the space on these ships was devoted to governmental operations and how much was used for ordinary trading purposes. How often were these vessels full of government cargoes and when was the vacant space at the disposal of shippers? Are the ships of this agency subject to suit in their own country, and is the immunity which is sought a privilege only to be accorded the vessel in for-

eign ports? It is interesting to note the fact that this case was at issue almost a year before it was finally tried, and no attempt was here made to take a deposition. We may safely assume, therefore, that the vessels were not engaged in governmental pursuits, but were mere merchant traders.

The question then presented is: Does the immunity which is ordinarily accorded a foreign sovereignty obtain in such a case? We rely entirely upon the views expressed in the following opinions of Mack, J., Circuit Judge, in the case of The Pesaro, which we earnestly urge should be adopted by this court. The field has been fully covered by this eminent and learned jurist, and to add anything more thereto would be like carrying coals to Newcastle:

MEMORANDUM OPINION.

MACK, *Circuit Judge:*

Libel *in rem* against the steamship *Pesaro* to enforce a claim for damage to a cargo of olive oil shipped thereon. Previously, when the ship was libelled to enforce the same claim, upon the direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession and therefore was not subject to arrest, this Court vacated the arrest. Upon appeal, the Supreme Court upheld the libellant's objection that this suggestion must come through the official channels of the United States. The Court added that it had no occasion at that time to consider what the decree should have been if the matters affirmed in the suggestion had been brought to the Court's attention

and established in an appropriate way. *The Pesaro,* 255 U. S. , decided February 28, 1921.

By stipulation, the parties have agreed that the question of jurisdiction shall be decided upon the basis of the following facts: First: That the steamship *Pesaro* was owned by the Kingdom of Italy, registered in the name of Ministry for Railway and Maritime Transportation, a department of the Royal Italian Government charged with affairs of maritime and rail transportation, which has as its head a member of the Italian Cabinet. Second: That the steamship was in the possession of the Italian Government, being manned by a Master, officers and crew employed by and under the direction of the Ministry for Railway and Maritime Transportation and paid by it. Such master, officers and crew were civilians not under the orders of or connected with the Italian naval or military forces, and the vessel was not carried on the roster of the Italian Navy as a naval vessel. Third: That the steamship *Pesaro* was engaged in commercial trade carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the Department of the Italian Government having to do with naval and military affairs. Fourth: That the letter (the substance of which, so far as necessary, is given in a note below, *a*) of Advocatto Francisco

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a "1. Question. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian Courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian Courts?

Answer. No. Such steamers, notwithstanding they may be owned by the U. S. Government are considered in Italy just the same as a privately owned merchant vessel, and are, therefore,

Montefredini, dated June 21, 1920, may be read by either party on the trial of the issues raised by the libel and the special claim and plea in abatement as the evidence of Francisco Montefredini with the same force and effect as if he had testified in accordance with the said letter; subject, however, to objection by either party to the case as to the materiality, relevancy or competency of the matters referred to in the said letter, or any of them.

The Supreme Court has recently intimated that it considered the question whether the ship of a foreign government used and operated by it as a merchant vessel, is, when within the waters of the United States, immune from arrest in admiralty, as "important and also new" and that the "proper solution is not plain but debatable." *In re Hussein Lufti Bey,* decided June 6, 1921. *In re Muir,* 255 U. S. , decided January 17, 1921. For that reason a re-examination of this question would seem to be justified, if not required, notwithstand-

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subject to arrest, but always on the authority of the President of the Tribunal.

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The U. S. S. B. steamers are subject to arrest, as above, only because they are merchant vessels, as according to the Italian law there is no difference between a vessel owned by a foreign Government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims.

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4. Question. Is the ship owned by the Italian Government operated as a merchant vessel by the Italian Government free from arrest in ordinary, judicial process in the Italian Courts?

Answer. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest.

This was simply a legal point, and the steamer was immediately released as the Government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

Now this procedure will be discontinued and all merchant vessels, whether Government-owned or privately owned, will be subject to arrest."

ing the decision in this Court in *The Maipo*, 252 Fed., 627; 259 Fed., 367, and the views expressed by the Circuit Court of Appeals in the *Carlo Poma*, 259 Fed., 369, especially as the decree in the latter case was vacated by the Supreme Court for want of jurisdiction in the Court of Appeals, decided February 28, 1921.

The general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision. See *Ex parte, In the Matter of the State of New York, Edward S. Walsh, Superintendent*, U. S. Sup. Ct., June 1, 1921. While the principle has been fervently defended by some jurists as vital and fundamental to sovereignty (see dissenting opinion of Justice Gray in *U. S.* v. *Lee*, 106 U. S., 196), the extent to which it has been carried or retained in modern law has been the subject of strong criticism (*Story, J.*, in *U. S.* v. *Wilder*, 3 Sumner, 308; *Laski, The Responsibility of the State in England*, 32 Harvard Law Review, 447; *Maguire, State Liability for Tort*, 30 Harvard Law Review, 20; cf. *Lord, Admiralty Claims Against the Government*, 19 Col. L. R., 467; *Weston, Actions Against the Property of Sovereigns*, 32 Harvard Law Review, 266), and there is observable a tendency to restrict its application or to guard against its extension (*U. S.* v. *Lee, supra; cf. South Carolina* v. *U. S.*, 199 U. S., 437).

Where the application of the doctrine is not clear, a solution is not to be found by reference to strict *Austinian* theory which assumes, by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from

suit may or may not justify the extension of the principle in modern law. In dealing with admiralty causes, historical or theoretical conceptions peculiar to the common law, must not be assumed to be a part of the maritime law of nations.

In attempting to solve a confessedly new and unsettled problem, the Court, while conforming its decision to certain norms or standards evolved from within the legal system, should not determine the application of these standards solely by logic. It may have to choose between competing judicial analogies and parallel trends of juristic thought; its conclusions should, if possible, conform to the practical ends of the law in a moving, working world.

So in dealing with an unsettled problem in the application of sovereign immunity, the Court must not only consider history and logic; it must also look behind and beyond both and inquire whether the public interests justify or require an extension of sovereign exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the Court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes.

The question of the exemption from attachment of a ship of a friendly sovereign first arose in our Courts in the case of *The Exchange*, 7 Cranch., 117. It concerned a public foreign ship of war. Bynkershoek had stirred the question whether any ship was immune from seizure, having laid it down as a general proposition that the property of a for-

eign sovereign was not exempt from attachment (*De Foro Legatorum,* Ch. IV.). Marshall, C. J., pointed out that "the jurisdiction of the nation within its own territory was necessarily exclusive and absolute and susceptible of no limitation not imposed by itself. * * * All exceptions to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage. * * * One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." Marshall consequently concluded as a principle of public law that ships of war entering the port of a friendly power, open to their reception, are to be considered by the consent of that power as exempt from its jurisdiction.

While the Court had no occasion to consider the case of a public ship used for trading purposes, Marshall (p. 145), pointed out "a manifest distinction between the private property of the person who happens to be a prince and the military force which supports the sovereign power and maintains the dignity and independence of a nation. A prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction; he may be

considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern."

While Marshall was probably referring to the private property of a prince as a private person, it is interesting to note the similarity of his language to that employed by him in the case of a state engaging in a commercial undertaking. In *The Bank of U. S.* v. *Planters' Bank of Georgia,* 9 Wheaton, 904, he said: "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates and to the business which is to be transacted." *b.* See also *Bank of Kentucky* v. *Wister,* 2 Peter, 318; *Briscoe* v. *Bank of Kentucky,* 11 Peter, 256, 323; *Louisville R. R.* v. *Letson,* 2 How. 497, 550; *Curran* v. *Ark,* 15 How., 304, 308; *Panama R. R.* v. *Curran,* 256 Fed., 772; *Lord & Burnham* v. *U. S. S. B., E. F. C.,* 265 Fed., 955, 957.

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b Compare the remarks of Lord Stowell in The Swift, 1 Dodo, 320, 339: "The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated. But the present question is—is this distribution of the public stores for the public use, a trading within the view of the statute. Looking to authority, as well as principle, and to the public convenience, I conceive, it is not."

In *U. S.* v. *Wilder,* 3 Sumner, 308, 315-317, Mr. Justice Story apparently was of the opinion that a government-owned merchant vessel might not be entitled to the same privileges and immunities as a ship of war. He said:

> "A distinction was taken in that case (The Prins Frederik, 2 Dod., R. 451), which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things extra commercium et quorum non est commercium. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronae,* and not to be applicable to common property of the sovereign of a commercial character or engaged in the common business of commerce. * * *
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> In the case of *The Schooner Exchange* (7 Cranch., R. 116), it was considered by the Court that the ground of exemption of the ships of war of a foreign sovereign coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or navy establishment, was entitled to a similar exemption. Bynkershoek seems, indeed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable, in the courts of another sovereign, where they are found, to be attached for his debts. His own government, in a case of that sort, released the property. Bynkershoek has the support of other jurists in favor of his opinion at least to the extent of their common private property, found in the foreign territory. But it is not necessary to consider this point further,

as there may be a clear distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

It has been laid down by Vattel (B. 2, S. 213) that the promises, the conventions, and all the private obligations of the sovereign, are naturally subject to the same rules, as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the Supreme Court of the U. S., in the case of *U. S.* v. *Barker,* 12 Wheaton R. 599. Vattel has added in the same place: 'If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws.' (Vattel, B. 2, S. 213.) I fear that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice; and the several states of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show that it is the duty of the sovereign to fulfill all his obligations, whether founded in contract or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice."

U. S. v. *Wilder,* it is true, is not a direct authority for the proposition here in question. The decision in that case was simply to the effect that government-owned cargoes not in the possession of the government could be withheld by virtue of a maritime lien arising from the obligation of the

cargo to contribute in general average. In *The Davis,* 10 Wall, 15, the Supreme Court went a step further and held that such cargoes could not only be retained without judicial process by the ship owner but could be libeled in admiralty by salvors seeking to enforce their lien against ship and cargo. See to the same effect *Johnson Lighterage Co.,* 231 Fed., 365. But cf. *The Fidelity,* 16 Blatchf., 569; 8 Fed Cases, 4758. Similarly, in *Long* v. *Tampico,* 16 Fed., 491, revenue cutters belonging to the Mexican Government but not yet delivered into her possession were held subject to libel for salvage services. On the same principle, a requisitioned vessel manned and operated for the Italian Government by her owners was held subject to attachment in *The Attualita,* 238 Fed., 909.

On the other hand, in *Briggs* v. *The Light Boats,* 11 Allen, 157, in an able and exhaustive opinion which has frequently been referred to by the Supreme Court, Judge Gray held that immunity of public ships was not restricted to ships of war; that "the exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character"; that, in consequence, lightships belonging to and in the possession of the United States could not be attached to secure the enforcement of a mechanic's lien. It should be remembered, however, that the case did not arise in admiralty and the actual decision does not go beyond that of the Supreme Court in *Ex parte. In the Matter of the State of New York, et al., owners of the steam tug Queen City,* decided June 1, 1921, in which the question of the

immunity of a public trading vessel from a libel *in rem* was expressly reserved. In *Mason* v. *Intercolonial Railway,* 197 Mass., 349, the Massachusetts Court, relying upon *Briggs* v. *The Light Boats, supra,* held that funds belonging to the Canadian State Railway were not subject to attachment under state law by trustee process.

The English courts grant exemption to a merchant vessel owned and operated by a sovereign state even in admiralty. Sir Robert Phillimore, in the *Charkieh,* L. R. 4, A and E., 59, and in the *Parlement Belge,* 4 Probate Div., 129, after a careful examination of the authorities and a comparison of the civil law on the subject, came to the conclusion that the exemption of a public ship from seizure did not extend to a vessel engaged in commerce, whose owner was (to use the expression of Bynkershoek) *strenue mercatorem agens:* But, in the latter case, on appeal (5 Prob. Div., 197), Sir Robert's opinion was not sustained. The Court of Appeals found that the carrying of passengers and merchandise had been subordinated to the duty of carrying the mails and that the mere fact that the *Parlement Belge* had been subordinately and partially used for trading purposes did not take away its general immunity, even if an action *in rem* were deemed to be a proceeding solely against the property, and not a procedure directly or indirectly impleading the owner of the property to answer the judgment of the Court. It was careful, however, to point out that in its opinion the owner was indirectly impleaded. Taking this dictum as a starting point, the English admiralty courts by successive decisions have come to recognize that all government-owned ships, whether used for military, political or commercial

purposes, are in time of peace, as well as of war, immune from seizure. *Young* v. *Scotia*, 1903 A. C., 501 (Ferryboat used as part of Canadian state railways); *The Jassy*, 1906 Prob. Div., 270 (Merchant vessel used as part of Roumanian state railways); *The Broadmayne*, 1916 Prob. Div., 64 (requisitioned vessel operated in government service by private owner); *The Gagara*, 1919 Prob. Div., 95; *Porto Alexandre*, 1920 Prob. Div., 30 (Merchant vessels owned and operated by friendly sovereign states).

The basis of these decisions is almost exclusively the authority of the *Parlement Belge, supra*. In *Porto Alexandre*, the great difficulties involved in granting an immunity so extensive were pressed upon the Court; but it felt bound by authority. Lord Justice Scrutton expressed the view that these practical difficulties must "be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent sovereign states."

The question, however, is whether international courtesy does or does not require this immunity to friendly foreign states, particularly if the immunity does not exist in favor of the sovereign's own similar interests in his own courts. Certainly there appears to be no consensus of opinion among international jurists to this effect. See *Wheaton International Law*, edited by Coleman Philipson (1916), p. 161; also 12 *Revue Generale de Droit International Public* (1905), p. 143. While the French Court of Appeal at Rennes held a merchantman owned by the British Government carry-

ing wheat and wool for the Allied Governments immune from seizure, it took occasion to point out that the vessel was being utilized "with an object of political interest for the need of national defense, apart from all idea of gain and speculation." More recent decisions of inferior French tribunals, following the English precedents in declining jurisdiction over public vessels employed in commercial service, have been adversely criticised. *Journal de la Marine Merchande,* February 3, 1921.

From the evidence before me it would appear that the Italian Courts refuse to grant immunity in such cases. In Section 9 of the Shipping Act, Congress expressly declared that vessels purchased from the Shipping Board, while employed solely as merchant vessels, shall be subject to the laws, regulations and liabilities governing merchant vessels; and even during the war emergency, this section was broadly construed by the Supreme Court. *The Lake Monroe,* 250 U. S., 246. Since then, the method of enforcing the liability of our public merchant vessels has been changed by the Suits in Admiralty Act so that the ships cannot and need not be arrested or detained, but the nature of their liability remains unchanged and is enforceable in the courts. Certainly then the exercise of jurisdiction by the courts in the case of public merchantmen cannot today be considered novel or revolutionary. The executive branch of our government, it may be assumed, will not be slow to bring to the attention of the judiciary by appropriate suggestion any matter of international courtesy or concern. The failure of our State Department to take any action in these cases is not

without significance, c (*Hearings before Committee on Judiciary in H. R. 7124, Suits in Admiralty Act*, 66th Congress, 1st Sess., August 26, 1919, p. 38), although I do not mean to say that immunity should be refused in a clear case simply because the executive branch had failed to act.

The English decisions above mentioned seem to proceed on the principle that a ship cannot be libelled *in rem* where the owner cannot under the common law be impleaded *in personam*. This doctrine, so far as effective, would appear to be peculiar to English admiralty and is not accepted as a part of the maritime law in this and other countries. As Justice Gray stated in *Homer Ramsdell Co.* v. *Com. Gen. Trans.*, 182 U. S., 406, 413, a case involving the liability of a ship for negligence of a compulsory pilot: "There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall, 53; *Ralli* v. *Troop* (1894), 157 U. S., 386, 402, 420; *The John G. Stevens* (1898), 170 U. S., 113, 120-122; *The Barnstable* (1901), 181 U. S., 464." See *The Maria*, 1 W. Rob, 95, 106, *The*

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c In answer to my inquiry, the Secretary of State, through the Solicitor for the State Department, stated on August 2, 1921:

"It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vesels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in such litigation."

Halley, L. R. 2 P. C., 193, 201. Lord Stowell, in *Neptune II,* 1 Dod., 467, had earlier laid down the rule as to the ship's responsibility for the acts of its pilots in accordance with the general maritime law. And it is perhaps no mere accident that Sir Robert Phillimore, whose views on the maritime law were rejected by the common law judges sitting in the Court of Appeals in the case of the *Parlement Belge, supra,* happened to differ from the Privy Council in the case of *The Halley,* L. R. 2 Ad. & Ec. 3.

It is also important to note that in the *Siren,* 7 Wall, 152, the Supreme Court recognized that a ship in the possession of the government might be held to respond in damages for the negligence of its officers resulting in a collision where the government brought the ship into court to be adjudicated as a prize. It would seem that even the English Courts have gone so far as to apply the doctrine of *respondeat superior* to a public ship in admiralty where the government consents to the suit. *The Athol,* 1 W. Rob., 374, 382. The procedural bar removed, it would appear that even a tort liability may in some instances at least be imposed upon a ship owned and operated by the government, notwithstanding the fact that the government could not, on common law principles, be impleaded in the court of claims on the basis of such a complaint (cf. also *Workman* v. *N. Y.,* 179 U. S., 570). In this connection, the words of Judge Story in *U. S.* v. *Wilder,* 3 Sumner, 308, 312, are important: "It is said that in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deduced that there can be no remedy

in rem. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States, in its sovereign capacity, would seem to furnish the strongest ground, why the remedy *in rem* should be held to exist."

Whatever may be the common law or the civil law on the subject and it is not necessary to go into that question here, it should be remembered that the responsibility of a ship in admiralty is not derived from either. It had its sources, as has been frequently pointed out, in the commercial usages and jurisprudence of the middle ages, and earlier. Originally, the primary liability was upon the vessel; that of the owner was not personal but incidental to her ownership; from this, he was discharged either by the loss of the vessel or by abandoning her to creditors. *The China,* 7 Wall, 53, 68; *The Barnstable,* 181 U. S., 464, 467. If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. That is a distinction or standard towards which Bynkershoek, Marshall and Stowell tended and in favor of which there is not only the specific authority of Story and Phillimore but the force of judicial analogy and the requirements of modern economic life.

If the *Pesaro* is not immune from seizure by reason of her government ownership, it would seem

clear that she could not claim exemption from attachment on account of the merchant service in which she was engaged. While in *The Davis,* 10 Wall., 15; *Long* v. *Tampico,* 16 Fed., 491, and *The Attualita,* 238 Fed., 909, the lack of possession by the government was stressed as of vital importance, in my judgment, such possession is not the exclusive criterion. Since, apart from the question of possible immunity by reason of government ownership, it is generally recognized that wtihout treaty provisions, merchant ships are not exempt from seizure by reason of their employment in the postal service (*Bonfils, Manuel de droit International,* 7th Ed., 1914, Sec. 629), immunity should not be given vessels owned and employed by the government in ordinary times in the usual channels of trade. To deprive parties injured in the ordinary course of trade of their common and well established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands. See *Hearings before Committee on Judiciary on H. R.* 7124 (Suits in Admiralty Act), 66th Congress, 1st Session, August 26, 1919, pp. 32 and 45. The attachment of public trading vessels, in my judgment, is not incompatible with the public interests of any nation or with the respect and deference due a foreign power.

In many phases of our law today it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law. True it is that in certain cases, involving historic functions of the state, the law is too well settled to admit of doubt or of any nice balancing of interests to determine whether or not judicial processes may be evoked. But where the law cannot be said to be plainly settled, it becomes the duty of the court to determine whether or not the public needs militate against the enforcement through the appropriate judicial channels of the ordinary rules of justice.

The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private. The public service functions of the state today may be as important in their bearing and as public in their character as the more limited functions to which it was the custom of the state to confine itself a century ago. In developing this field of law, expressions used by the courts have often been inept and inaccurate; the distinctions drawn in specific cases specious and negligible. Yet a sound principle, though at times, perhaps dimly discerned and mistakenly applied, underlies the cases. The principle is developing in the field of municipal corporations. *City of Los Angeles* v. *Los Angeles Gas Corporation,* 251 U. S., 32. The principle also finds application in the delimitation of the sphere in which the instrumentalities of a state are immune under our constitution from federal taxation. *South Carolina*

v. *U. S.*, 199 U. S., 437. While these cases involve the question of substantive liability rather than procedural immunity, the analogy is none the less pertinent; in my opinion, a government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.

And as the *Pesaro* was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.

But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the *Pesaro* would, nevertheless, not be entitled to immunity.

I do not base this upon the fact that ships owned and operated for commercial purposes by the United States would not be exempt from ordinary process under Italian law, for retaliation and reprisal are for the executive branches of our government and not for the courts. *The Nereide,* 9 Cranch, 388, 422; *Bank of Augusta* v. *Earle,* 13 Pet., 519, 589; *Beale I Conflicts of Law,* Part 1, p. 103. The doctrine of reciprocity in *Hilton* v. *Guyot,* 159 U. S., 113, should not be extended to a case involving the very jurisdiction of the court.

But the fact that the steamship *Pesaro* itself is subject to the ordinary processes of the Italian Court would seem to be vital and decisive. There

is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States. In *Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheaton, 904, Chief Justiec Marshall said: "The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of sovereign character, so far as respects the transactions of the bank and waives all privileges of that character. * * * We think that the Planters' Bank of Georgia is not exempted from being sued in the Federal Courts, by the circumstance that the state is an incorporator." So it may be said here that the Italian Government, by giving to the *Pesaro* the capacity to be sued in the Italian Courts, voluntarily strips the *Pesaro* of its sovereign character and waives all privileges of that character; and that therefore the *Pesaro* is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship *Pesaro* in the Courts of Italy, it is difficult to see why our tribunals should decline jurisdiction: there is less reason therefor in a case of this sort than in *The Belgenland*, 114 U. S., 355.

October 1, 1921.

JULIAN W. MACK,
U. S. C. J.

SUPPLEMENTAL OPINION.

MACK, *Circuit Judge:*

My attention has been directed, and I have given further consideration to some of the Continental authorities on the subject. There is, as has already been indicated, much difference of opinion among the European jurists as to the extent of the immunity to be accorded foreign sovereign states. Conservative opinion seems to favor the non-suability of foreign sovereign states in practically all cases. See *Loening, Die Gerichtsbarkeit uber fremde Staaten und Souveräne,* 1903; v. *Dynovsky, Unzulaessigkeit einer Zwangsvollstreckung gegen auslaendische Staaten; Van Praag, Jurisdiction et Droit International,* 1915, pp. 340-405. But some of the most eminent jurists have vigorously opposed according immunity from judicial process to foreign states in matters not affecting their political or sovereign rights. *Fiore, Nouveau Droit International,* No. 500 ff.; *Von Bar, Annuaire de l'Institut de Droit International,* Vol. XI, p. 414 ff.; *Laurent, Le Droit Civil International,* Vol. III, pp. 74-89; *Despagnet, Droit International Privé,* no. 179; *Weiss, Traité de Droit International Privé,* 2d Ed., Vol. V, pp. 85-115; *Baudry-Lacantinerie et Houques Fourcade, Droit Civil, Des Personnes,* Vol. 1, no. 657; *DeLapradelle, 1910 Darras-DeLapradelle* (*Revue de Droit International Privé*), Vol. VI, p. 779. The Institute of International Law at its conference at Hamburg in 1891 adopted a number of resolutions proposed in the report of Von Bar with reference to actions against foreign states. Among those actions recognized by the Institute as properly maintainable against a

foreign sovereign state were: "Les actions qui se rapportent à un établissement de commerce ou industriel ou à un chemin de fer exploité par l'etat dans le territoire; * * * Les actions en dommages—intérêts nées d'un quasi-délit, qui a eu lieu sur le territoire (*Annuaire de l'Institut de Droit International,* Vol. XI, p. 436)." The suability of a merchant vessel owned and operated by a foreign state would apparently fall within the principles, if not the literal rules, formulated by the Institute. These principles were recognized to some extent in the Treaty of Peace with Germany, Article 289 of which provided: "If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty."

There seems to be quite a conflict of views in the actual jurisprudence of European countries in this matter. *Walton, State Immunity in the Laws of England, France, Italy and Belgium, Journal of Comparative Legislation and International Law,* October 1920 (Third Series, Vol. II, Part I, p. 252); *Van Praag,* op. cit., pp. 400-407. The German decisions have tended to accord foreign sovereign states virtually complete immunity. *Von Hellfield* v. *Russian Government* (*Anhalt Case*); *In the Royal Prussian Court for the Determination of Jurisdictional Conflicts,* 1910 (reported in full, 5 *American Journal of International Law,* 490); *Salling* v. *U. S. Shipping Board* (*S. S. Ice King*), *Hanseatische Gerichtszeitung* (*Hauptblatt*), 1921, p. 85, p. 110. The French jurisprudence, as has already been indicated, looks in the same direction. *Lambiege & Pujol* v. *Spanish Government,* 1849, *Dalloz* I, 5; *The Englewood, Clunet,* 1920, p. 621, and *Darras-DeLapradelle,* 1921, p. 74. But see,

Lakkowsky v. *Office Suisse, Darras-DeLapradelle,* 1921, p. 70. It is possible that both the French and German Courts have felt that analogous actions brought against their own Governments would, in the absence of statutory enactment, more naturally under their system of law, come under the purview of their administrative tribunals, which, of course, could not entertain complaints against foreign states, and they consequently may have seen some embarrassment and difficulty in subjecting foreign states to tribunals incompetent to act against their own Governments. If this be true, it only emphasizes the desirability of keeping the admiralty rules so far as possible free from the peculiarities of local law and jurisprudence. It is unnecessary here to consider how the somewhat similar problem that arises where a foreign state engages in a commercial undertaking, such as the operation of a railway, within the jurisdiction of another state, should be dealt with. The Italian tribunals (*Clunet,* 1888, p. 289; *Clunet,* 1889, p. 335; *Darras-DeLapradelle,* 1906, p. 527) and also the Swiss (*Dryfus* v. *Austrian Ministry of Finance, Darras-DeLapradelle,* 1918, p. 172) go very far in holding foreign states subject to their jurisdiction whenever the foreign states are acting, as it is phrased, not in a sovereign or political capacity (*jure imperii*), but as subjects of civil rights (*jure gestionis*). The Belgian jurisprudence is in accord with that of Switzerland and Italy as to the power of the courts to assume jurisdiction and give judgment, but doubt is cast on the power of the courts to attach or levy execution against the property of a foreign state. *Liege & Luxemberg Ry.* v. *The Netherlands, Clunet,* 1904, p. 417; *Ottoman Government* v. *Gaspary and Slioberg, Pasicrisie Belge,*

1911, p. 104. The doubt raised may be a source of difficulty in some cases; but where, as here, a specific claim arising in the ordinary course of trade is asserted against property employed for commercial purposes, which, if in the possession of a public service corporation, would be subject to seizure, there seems little reason against enforcing, by detention, and if need be sale, of such property of a foreign state, a judgment reached by those judicial processes which are recognized in all civilized countries as binding between individuals and corporations. In countries where declaratory judgments are authorized, such judgments might be of some value even though there were no power of compulsory execution. But the enforcement of such judgments only through resort to distant foreign lands or through the delicate medium of diplomatic representations, would fail adequately to serve the needs of modern economic life. These should indeed yield to the greater need of peaceful and harmonious international relations, but it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the PESARO would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern.

I have not attempted to discuss many points of distinction involved in the European jurisprudence and doctrine, but my examination of the foreign

law, such as it was, has served to strengthen the conclusion heretofore announced in these cases.

December 13, 1921.

(Sgd.) JULIAN W. MACK,
U. S. Circuit Judge.

It would be a strange anomaly if the ships in effect owned by the American Government through the agency of the Emergency Fleet Corporation might be liable in our courts (*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* decided by this court May 1, 1922), as well as in the courts of each other nation, and yet a foreign government which does not undertake to organize a corporation as its agency could be held immune while engaging in similar practices.

POINT III.

The decrees should be affirmed, with costs.

Dated, September 21, 1922.

Respectfully submitted,

CELLER & KRAUSHAAR,
Proctors for Libelant-Appellee.

MEYER KRAUSHAAR,
EMANUEL CELLER,
of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

TIETJEN & LANG DRYDOCK COMPANY,
Libelant-Appellee,

against

The Steamship "SAO VICENTE", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant.

No. 279.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libelant-Appellee,

against

The Steamship "MURMUGAO," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant,

No. 280.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY, Libelant-Appellee, *against* TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.	No. 281.
THOMAS DE SIMONE, Libelant-Appellee, *against* The Steamship "MURMUGAO", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.	No. 282.
THOMAS DE SIMONE, Libelant-Appellee, *against* TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.	No. 283.

BRIEF FOR MAXWELL ROSE.

STATEMENT.

1. *The nature of the litigation.*

These five suits were brought in admiralty on claims for services rendered, and supplies, materials and labor

furnished, to the steamships *Sao Vicente, Murmugao* and *Cunene,* owned by Transportes Maritimos do Estado.

The amounts involved in the five suits, including interest, total more than $175,000.

In the two suits brought by Maxwell Rose, the total amount due, including interest, is over $56,800. *Record,* pp. 87, 143.

It is not disputed that the damages referred to, which were awarded under the decrees of the District Court, are due and owing to the libelants-respondents, under the claims set forth in the original libels.

2. *The facts.*

During July, August and September, 1920, Maxwell Rose furnished stevedoring services to the steamships *Murmugao* and *Cunene* at the port of New York, at the request of the agents and persons who had charge of the steamships, and in reliance upon the credit of the said vessels.

It has been admitted that the said stevedoring services were rendered at the request of "The then agents" of the said steamships. *Record,* pp. 46, 108.

After the services had been rendered, Rose presented his bills to the masters and agents of the vessels, and the bills were approved by them, the masters signing the bills against their respective ships, as indication of their approval. *Record,* pp. 55, 56, 116.

3. *The pleadings.*

Not having been able to obtain payment of his bills, Rose filed two libels in admiralty.

For the services rendered to the *Murmugao,* a libel was filed against that vessel *in rem;* and as she was then at New York, process of arrest was issued in accordance with the usual admiralty practice, and the vessel was seized by the United States marshal. *Record,* p. 45.

For the services rendered to the *Cunene,* the libel was filed *in personam* against Transportes Martimos do Estado, a foreign corporation, and the owner of the two vessels; and, in accordance with the admiralty practice, inasmuch as the owner could not be found within the district, process of foreign attachment was issued against the steamship *Murmugao,* and she was seized by the United States marshal in that suit. *Record,* p. 106.

The jurisdiction of the court, and the writs under which the Murmugao was arrested in the two suits, were not challenged.

On the contrary, in the suit against the *Murmugao in rem,* the owner filed a claim in the usual admiralty form through its agent. *Motion to Dismiss or Affirm, Schedule A,* pages 25-27; and also filed the usual stipulations for costs and value, required by the rules of the court. *Motion to Dismiss or Affirm, Schedules C-1, C-2,* pages 26-31.

In the suit *in personam,* the owner, appearing by its proctor, filed *a general appearance,* accompanied by the usual bond for costs, a claim executed on behalf of the owner by its agent, and a bond discharging the attachment. *Motion to Dismiss or Affirm, Schedules B, D-1, B-2, and D-2,* pages 33-40.

On the filing of the claims, bonds and appearances, the jurisdiction of the court over the steamship *Murmugao,* and over the person of her owner, was completed, and the steamship was released from the custody of the marshal.

Neither the claims, nor the general appearance in the *in personam* suit, nor any of the stipulations for costs and value in the two suits contained any reservation whatsoever as to the jurisdiction of the court.

In both suits, the bonds or stipulations for value were executed by Transportes Maritimos do Estado, signing by the Acting Consul General of Portugal at New York; and they were also signed by the American Surety Co., a corporation of the State of New York, as surety.

In each instance, the said stipulators agreed that they would "*abide by all the orders of the court,* interloctuory or final, *and pay the amount awarded by the final decree* rendered by this court, or by any appellate court, if an appeal intervene, with interest." *Motion to Dismiss or Affirm,* pages 29, 38.

Some three weeks after the vessel had been released by the filing of the general appearance, claims and stipulations referred to, an answer was filed in each suit, admitting that the services had been rendered, and the supplies, etc., had been furnished to the *Murmugao* and *Cunene* by Maxwell Rose, at the request of the then agents for the vessel. *Record,* pp. 46, 108.

Each answer, as an alleged separate defense, contained the following clauses:

"1. That the steamship *Murmugao* is a Portuguese vessel flying the flag of Portugal and is owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants' Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

2. Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by the sovereign foreign government of Portugal as aforesaid and that it cannot be sued in the Courts of the United States without its consent."

These answers were filed in the name of Transportes Maritimos do Estado.

They were verified by the acting Consul General for the Government of Portugal in the following form:

"The respondent, *as I am informed and believe,* is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government. * * * The sources of my information and the grounds for my belief as to the matters stated to be alleged on information and belief are records at the Port of New York *and communications received from the agents of the steamship* * * *". (Italics ours.)

4. *The proceedings in the District Court.*

The answers,—similar in form in each of the five suits,—admitted the justness of the claims, and the fact that payment had not been made; *and contained absolutely no allegation of any defense to the merits.*

Accordingly, exceptions to the answer were filed in each suit by the respective libelants, challenging the right of the owner of the vessels to plead the alleged immunity in the answers as a bar.

The argument of the exceptions was delayed, during negotiations for settlements, which ultimately proved to be abortive.

Finally, the exceptions in the *Tietjen and Lang,* and the *Rose* suits were argued before Judge Knox, who sustained them, saying in his opinion:

> "Be this as it may, as I view the doctrine of immunity of a sovereign from suits such as these, it is not so sacred as to require its application unless the sovereign insists upon its immunity at their inception of a given litigation. The Supreme Court has held in *Richardson* v. *Fajardo Sugar Co.,* 241 U. S. 44, that a government may waive its sovereign attributes, and I hold that in so far as the present respondent possesses only the right of immunity, it has waived the same. * * * So long as a distinction is recognized between general and special appearances, such distinction must be given its logical effect." *Record,* pp. 50, 51; 111, 112.

Judge Manton, in the same court, had previously overruled the similar exceptions in the De Simone suits.

When his attention was directed to Judge Knox's decision, Judge Manton ordered the De Simone suits peremptorily to trial, and during the course of the final hearing, reversed his original ruling, and sustained the exceptions.

As a result of the orders of the District Court sustaining the exceptions to the answers, the only question remaining open in the *Rose* suits was the exact amount of damages due in each suit.

In accordance with the usual practice, the two cases were sent to a special commissioner to hear proof of, and determine the amount of damages recoverable.

Extended references were had before the commissioner, in the course of which the libelant, Rose, established the amount due to him in each case.

Not a single word of testimony was offered by the owner of the ship to rebut or contradict the libelant's testimony.

The commissioner having reported to the court the amount due to the libelant in each suit, his report was confirmed, and final decrees were entered. *Record*, pp. 86, 87; 141-143.

5. *The appeals.*

Upon the entry of the final decrees in all five cases, appeals were taken by Transportes Maritimos do Estado to the United States Circuit Court of Appeals for the Second Circuit.

It will be observed that even in the notices of appeal filed in each case, no mention whatever was made of any interest of the Portuguese Government in the suits. The

notices were all filed in the name of the *Murmugao,* and Transportes Maritimos do Estado. *Record,* pp. 89, 145.

As soon as the records on appeal were filed in the several cases, the several libelants-appellees presented to the Circuit Court of Appeals motions to *dismiss or affirm.*

The motion in the *Tietjen & Lang* case was heard first. That motion was granted, and the appeal was dismissed.

A reargument was allowed the appellant in that case, and, on the statement of appellant's proctor, that the appeals in the *Rose* and *De Simone* suits involved only the same question as that raised in the *Tietjen & Lang* appeal, the motions to *dismiss or affirm* made by Rose and De Simone were adjourned by the court, on the understanding that the decision on the reargument in the *Tietjen and Lang* case should apply also to the other suits.

After the reargument, the Court re-stated its decision dismissing the appeals; and subsequently filed a written opinion setting forth the reasons for its decision. *Record,* pp. 98-102.

6. *The question involved.*

As has been stated, there was not any defense put forward to the merits, or even suggested, by the owner of the vessels in the proceedings in the District Court.

The suits in that court were disposed of on the single question of law, that the alleged bar of immunity *could not be pleaded as a defense in the answers,* after the fil-

ing of a general appearance and a sealed and solemn agreement to abide by the decision of the Court and to pay any judgment or decree which might be entered.

The correctness of the ruling of the District Court *on this one point* was the *only* question raised in the appeals to the Circuit Court of Appeals.

It was on this one question that the Circuit Court of Appeals *dismissed the appeals.*

Therefore it would seem that that is the only question which is brought up for review by this Court under the writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit.

For even if the appeal be construed as a trial *de novo,* the question referred to *is the only question which has ever been raised by the appellant during the litigation.*

FIRST POINT.

THE DISTRICT COURT HAS JURISDICTION OF THE SUBJECT MATTER OF THESE SUITS, AND OF THE VESSEL AND OF THE PERSON OF THE RESPONDENT, AND THE CIRCUIT COURT OF APPEALS WAS RIGHT IN AFFIRMING THE DECREES IN FAVOR OF THE LIBELANT.

Jurisdiction of a Court over a controversy involves the jurisdiction of the Court over—

1. The subject matter of the controversy.
2. The persons and/or property of the litigants

on whose rights the decree of the Court may operate.

Jurisdiction has perhaps been nowhere more clearly defined in the decisions of this Court than in the case of *Cooper* vs. *Reynolds,* 10 Wall, 308 (1870), in which case the question of attachment of property under the Tennessee Code of 1857 to 1858 was involved.

In dealing with the question of jurisdiction, Mr. Justice Miller, in rendering the opinion of the Court in that case, 10 Wall., at page 316 (Italics ours), said:

> "It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.
>
> "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.
>
> "Jurisdiction of the person is obtained by the service of process, *or by the voluntary appearance of the party in the progress of the cause.*
>
> "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and

extent of the authority vested in it by law in regard to the subject-matter of the cause."

In the present case we have both elements necessary to found the decrees of the Court below.

The actions involved ordinary admiralty claims, which were put forward in the libels. No suggestion to the contrary has ever been raised by the owner of the vessels.

In the two cases on behalf of Maxwell Rose, Nos. 280 to 281, the action was for stevedoring services.

In case No. 280, the services were rendered directly to the steamship *Murmugao,* and constituted a lien under Maritime Law against her. *Record,* p. 44.

In the other case, the services had been rendered to the steamship *Cunene,* owned by the respondent named in that case, the Transportes Maritimos do Estado. *Record,* p. 105.

Thus there is not any question as to the jurisdiction of an admiralty Court of the United States *over the subject matter,* because stevedoring contracts are subject to Maritime jurisdiction. *State Industrial Commission* vs. *Nordenholt Corp.,* October Term 1921 No. 625, decided by this Court on May 29, 1922. *The Seguranca* (S. D., N. Y., 1893), 58 Fed. 908; *Luckenbach* v. *Pearce* (C.C.A. 5th, c. 1914), 212 Fed. 387; *The Rupert City* (D.C., Wash., 1914), 213 Fed. 263; *Atlantic Transport Company* v. *Imbrovek* (1914), 234 U. S. 52.

The steamship *Murmugao* was arrested in the proceeding *in rem,* and attached in the proceeding *in per-*

sonam by writ of foreign attachment, according to admiralty procedure.

There was not any challenge made to these writs at the time when they were levied, but on the contrary the owner of the *Murmugao,* in the *in rem* proceeding, filed a claim in the usual admiralty form, through its agent, *Motion to Dismiss or Affirm, Schedule A, pages 25 to 27;* and it also filed the usual stipulations for costs and value required by the rules of the District Court of the United States for the Southern District of New York, *Motion to Dismiss or Affirm,* Schedules C-1, C-2, pages 26 to 31.

There was not any reservation, or anything in the nature of a special appearance in either the claim or the stipulations; and the stipulation for value, under settled principles of admiralty jurisdiction, became the *res,* and was substituted for the arrested steamship.

In the *in personam* action, there was a general appearance on behalf of Transportes Maritimos do Estado, accompanied by the usual bond for costs, a claim, and a bond discharging the attachment. *Motion to Dismiss or Affirm,* Schedules B, D-1, B-2 and D-2, pages 33 to 40.

By the filing of these claims, appearances and bonds the jurisdiction of the Court was completed *over the steamship Murmugao and the person of her owner.*

By both bonds, *Motion to Dismiss or Affirm, Schedules C-2, pages 29 to 31, and D-2, pages 38 to 40,* the stipulators, who were the Transportes Maritimos do Estado, signing by the acting Consul General of Portugal, and the American Surety Company, a corporation of the State of New York, agreed that they would "*abide by all*

the orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court or by any Appellate Court, if an appeal intervene, with interest."

In the event of such payment the stipulation provided that it was to be void; otherwise it was to remain in full force and virtue.

The same provisions were contained in the stipulations for costs. *Motion to Dismiss or Affirm,* folios 79, 88, 103 and 115.

Thus, there has been substituted in the place and stead of the steamship *Murmugao* and of the Transportes Maritimos do Estado, obligations of an American corporation, the American Surety Company of New York, directly responsive to the decree of the Court, *and the fact that this was done advisedly is shown by the signature of the Acting Consul General of Portugal to the said stipulations.*

There is not, and never has been, any suggestion that the Consul General of Portugal did not have the right to arrange such stipulations and sign them.

In fact, as the commercial representative of the Portuguese Government at New York he must be presumed to have had the power to deal with such emergencies.

The case of *Workman* v. *New York City,* 179 U. S., 552 (1900), gives, in the opinion of the Court, a very interesting statement by Chief Justice White, then an Associate Justice, of the jurisdiction of Admiralty

Courts as affected by claims of Governmental immunity. At page 566 he said:

> "The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all martime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of

> power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted."

Under the circumstances referred to, there have been no grounds for immunity shown in the present case, and none can be shown.

Immunity, such as that which by international comity is accorded to a foreign sovereign, is only a personal privilege, and the person who has it can waive it. *Clark* v. *Barnard* (1882), 108 U. S. 436, 447; *Mighell* v. *Sultan of Johore*, 1 Q. B. (1894), 149. 160, 162.

It is universally held that immunity is waived by a general appearance.

In the case of *Farrar & Brown* v. *U. S.*, 3 Pet., 458 (1830), Chief Justice Marshall held that the Attorney General of the United States, by a general appearance, cured any defect in the service of process on the United States and that the general rule that such an appearance did cure a defect in process was applicable to the United States as well as to any private litigant. He said at page 458:

"The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney-general in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every attorney-general, and has never been objected to. It might be considered, therefore, as having an implied acquiescence on the part of the attorney-general, although it is admitted that there is no evidence of any express assent. We do not say that this practice would be conclusive against the attorney-general, if he should at the first term withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity, in the services of process. But if he lets it pass for that term, without objection, we think it is conclusive upon him as to an appearance.

"The decisions of this Court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine. The cause, therefore, is ordered to be reinstated.

"On consideration of the motion made by the attorney-general, on the part of the defendants-in-error in this cause, to dismiss the writ of error in this cause, on the ground that the citation is made returnable to a day during the vacation, to wit: on the first Monday in January, A. D. 1828, whereas the return day should have been the second Monday in January, A. D. 1828, it is ordered by the Court that, inasmuch as the said defect is cured by the appearance of the attorney-general on the part of the defendant, said motion be and the same is hereby overruled."

In the English case of *Mighell* v. *Sultan of Johore* (1894), 1 Q. B., 149, the Court discussed the question as to how and when the immunity might be waived, and held that it would be waived by an appearance. Lopes, L. J., said at page 161:

> "In my judgment the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, *by appearance to a writ.*" (Italics ours.)

Kay, L. J., said at pages 162, 163:

> "The next point is this. It is said that an independent sovereign may waive his right to immunity and may treat himself as subject to the jurisdiction. I agree; but how is that to be done? * * * The passage cited from Vattel by Lopes, L. J., is emphatic on this very point, and shews that the time at which the immunity is to be waived must be *when an action is brought* against the foreign sovereign. * * * I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless, *upon being sued,* he actively elects to waive his privilege and to submit to the jurisdiction. * * *"

This Court, in its opinion in *Clark* v. *Barnard* (1882), 108 U. S. 436, discussing the same question, held that where a suit was otherwise properly brought, in which a state had sufficient interest to entitled it to become a party defendant, "its appearance in a court of United States would be a voluntary submission to its jurisdiction."

In the case of *Brewing Co.* v. *McElligott* (S. D. N. Y., 1919), 259 Fed. 321, Judge Augustus N. Hand, discussing the rule pointed out that, to be availed of, a claim of immunity must be raised at the outset of the case and before general appearance. He said at page 327:

> "In the case of *Richardson, as Treasurer of Porto Rico* v. *Fajardo Sugar Co.*, 241 U. S. 44, * * * the Treasurer of Porto Rico, who had been sued in the United States District Court for Porto Rico, appeared and answered the complaint, and it was held that under these circumstances it could not deny the court's jurisdiction, because if its sovereignty exempted it from suit, *the exemption would only exist where it challenged the jurisdiction of the court at the outset.* This, I think has been the general rule as to a foreign sovereign or *quasi* sovereign." (Italics ours.)

To the same effect is the decision in *Gunter* v. *Atlantic Coast Line* (1905), 200 U. S. 273.

In the present cases we not only have general appearances, but we also have solemn, formal, sealed agreements in the form of bonds, signed by a consular officer, by which the owner of the steamship *Murmugao* as claimant in suit No. 280, and respondent in suit No. 281, has formally, with a surety, agreed to abide by the orders of the Court.

It is difficult to conceive how a consent to jurisdiction, or a waiver of immunity could be more solemnly and conclusively evidenced; and in the face of such consent and waiver, it is not possible for the steamship *Murmugao* or the respondent, to escape from its liabilities as found by the Court.

In *Porto Rico* v. *Ramos* (1913), 232 U. S. 627, this Court said at page 632:

> "The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view, but the immunity of a sovereignty from suit without its consent, cannot be carried so far as to permit it to reverse the action invoked by it *and to come in and go out of court at its will*, the other party having no right of resistence to either step." (Italics ours.)

The essence of the enforcement of judicial procedure in our Courts is finality in the various steps of litigation and inability of a party to change his mind on a step after he has once taken it.

It is submitted that even a foreign sovereign, assuming that a sovereign is involved in the present case, should not be permitted to fly in and out of Court at its pleasure, like a bat in a belfry.

It is submitted, therefore, that in the present cases the Transportes Maritimos do Estado and its vessels cannot escape from the decrees which have been had against them, and which they have solemnly undertaken to pay.

It may be urged on behalf of the respondents that the exceptions filed to the plea of governmental immunity contained in the answers involved an admission of the governmental status of the steamship *Murmugao* and the steamship *Cunene* and, hence, that the District Court should have allowed the cases to go to trial on that issue, instead of sustaining the exceptions.

The difficulty with this position is that it is a well settled rule of law that an exception to an answer opens up the whole record, *United States* v. *Central Nat. Bank* (1882), 10 Fed. 612, 615; 137 U. S. 355; and the whole record in these cases showed, in each suit, a libel which stated a good cause of action in admiralty, followed by a general appearance, or a general claim, and a general bond agreeing to abide by the jurisdiction of the Court.

That is the reason why the District Court held that immunity had been waived and that interlocutory decrees must be granted, notwithstanding the belated averment of immunity contained in the separate defense of the answer.

The fallacy of the argument set forth in the Third Point of appellant's brief, at page 10, lies in the fact that the appellant apparently deems an appearance and an answer as being one and the same document, and as serving one and the same purpose.

The statement in the same point of appellant's brief that "the subject matter of the action is sovereign property" seems to be entirely incorrect, for clearly the subject matter of these suits is the right of the several libelant-appellees to recover for the services rendered by them.

The suggestion in paragraph 2, at page 15 of appellant's brief, that in these cases a foreign sovereign has been *forced* to submit to the jurisdiction of the court, and the suggestion in the Sixth Point of appellant's brief, page 16, that the decrees of the District Court in these cases are in positive violation of the sovereignty of an

independent foreign sovereign, are, of course, entirely beside the point.

The owner of the vessels was not forced to waive any immunity which might have existed, for certainly the question of immunity could have been raised and preserved by the owner of the vessels through a special appearance. This was done in all of the recent cases in which the question of immunity has come before this court. *The Pesaro* (1920), 255 U. S. 216; *The Carlo Poma* (1920), 255 U. S. 219; *Ex Parte Muir* (1920), 254 U. S. 520.

The suggestion of a violation of sovereignty, and the implication that an affirmance of the decrees of the District Court would furnish a *casus belli*, certainly can have no application to a case where the alleged privilege of immunity has been waived.

Furthermore, as the immunity accorded to a foreign sovereign by international comity, is a *personal privilege*, granted by our Government, how far must the privilege be extended? Certainly it would seem that the privilege cannot be abused, and that having once been waived by the party claiming it, our courts cannot thereafter be compelled to extend the privilege any further to the detriment of the rights of our own citizens.

SECOND POINT.

THERE IS NOT ANY PROOF IN THE CASE REGARDING THE GOVERNMENTAL NATURE OF THE OWNERSHIP OF THE STEAMSHIPS *Murmugao* AND *Cunene*, CONSEQUENTLY A LARGE PART OF THE ARGUMENT IN THE PETITIONER'S BRIEF IS ENTIRELY IRRELEVANT.

Even if the facts were established, the question is, as has been stated by this Court, new and debatable, *Ex Parte Hussein Lufti Bey* (1921), 256 U. S. 616.

As these are cases where the sole question is the question of waiver of immunity, we have omitted to deal with the cases on the question of immunity.

However, in passing, the Court's attention is called to the fact that at no time in these proceedings has there ever been any suggestion presented, in proper form, alleging any government ownership of the vessels.

No such suggestion has been made or presented even up to the present date.

This court, in its decision in *Ex Parte Muir* (1920), 254 U. S. 520, discussed the method by which the question of the alleged immunity of foreign vessels could be presented to our courts for consideration; and it is inconceivable that the decision of this court in that case is unknown to counsel for the owner of the vessels involved here. Yet there has never been the slightest attempt or offer on the part of the owner of the vessels

to comply with the requirements laid down by this court in that decision.

The Portuguese Government has never by proper diplomatic communications or otherwise become, or requested to become, a party to these suits.

As the Circuit Court of Appeals for the Second Circuit pointed out, the answers were verified by the Acting Consul General of Portugal *on information and belief,* and he stated that the sources of his information and the grounds for his belief were statements made to him by agents of the vessels.

Moreover, as the Circuit Court of Appeals also pointed out in its opinion, the answers filed on behalf of the owner of the vessels, did not even allege that the vessels were owned by any foreign sovereign government, but merely alleged that the vessels were owned by a department of a sovereign foreign government. *There was nothing set forth in the answers to show that the ownership of the department was in fact the ownership of the sovereign itself.*

The significance of this general situation is that everything done in these cases, on behalf of the owner of the vessels, leads to the strong presumption that the allegation of Government ownership and immunity, besides being presented too late, is not well founded.

It is difficult to believe that had these vessels been actually owned and operated by the Government of Portugal, the Acting Consul General, in attempting to plead that fact in the answers, would have been obliged

to rely on information given to him by the vessels' agents. It would seem that he should have been able to obtain direct information from the Government which he represented.

It is to be remembered that the answers were not filed until some three weeks or more after the vessels had been arrested.

Surely there was ample opportunity for the Consul to have communicated with his Government during that time, and no legitimate excuse can be put forward for the Consul's lack of information if, in fact, the vessels had been owned and operated by his Government.

It is further significant that the Government of Portugal has never made any direct suggestion to the court in these proceedings with respect to the alleged Government ownership, in spite of the requirements so clearly set forth by this Court in *Ex Parte Muir, supra.*

It is also significant that the Government of Portugal has never made any representation to the court that the filing of the general appearance, claims and bonds at the outset of the litigation was the act of an unauthorized agent. *The filing of those documents has never been repudiated by the Portuguese Government.*

Counsel for the appellant now unscrupulously seeks to inject into the cases, by means of the so-called "Exhibit I" attached to appellant's brief, some testimony to support his statement that the vessels were in fact owned by the Portuguese Government.

The libelants-appellees have filed a motion to strike the said "Exhibit I" from the records of the court in these cases.

Even if the "Exhibit I" could be accepted by the Court, it is significant that in the matters contained in that document, there is not any properly authenticated proof of government ownership.

Therefore, in addition to the fact that immunity, if any ever existed, was waived at the outset of these suits, there is the fact that at *no* stage of these proceedings has there ever been any proper foundation for any claim of immunity.

THIRD POINT.

THE LITIGATION IN THESE SUITS HAS BEEN CONTINUED BY THE OWNER OF THE VESSELS ADMITTEDLY FOR PURPOSES OF DELAY.

As evidence of this fact, there is the statement made by Frank M. Patterson, Esq., proctor for the owner of the vessels to counsel for Maxwell Rose, at the outset of the litigation, to the effect that if the proceedings were pressed to decrees, he, the said Patterson, on behalf of his client, would be obliged to seize every opportunity and means of prolonging and delaying the litigation. *Motion to Dismiss or Affirm*, fols. 24, 25.

There is the further evidence of this fact in the statement made by the present counsel for appellant to Judge Augustus N. Hand, in the course of these proceedings, in which Mr. Kohler said that although the claims put forward by Maxwell Rose would, in his opinion, even-

tually be paid, the payment was being delayed because of the fact that the owner of the vessels could not, under the existing depreciation in the rate of exchange, make payment without great sacrifice to itself. *Motion to Dismiss or Affirm*, fol. 35.

It is submitted that these statements furnish the key to the belated attempt of the owner of the vessels to put forward the alleged immunity of the vessels.

The probabilities are that when the general appearance, claims and bonds were filed, it did not occur to the owner of the vessels to set forth any reservations regarding alleged immunity, *because of knowledge that the grounds for such immunity did not exist.*

Subsequently, having found that no defense could be set forth to the claims on the merits, the owner of the vessels unscrupulously attempted, in its answers, to inject the suggestion of immunity into the cases, in the hope of prolonging the litigation, and thus gaining its end with respect to delaying the day of reckoning.

Certainly that explanation of the situation makes clear the continued failure of the Portuguese Government to make any direct or proper representations to the court of the alleged government ownership.

Under such circumstances, it is difficult to believe that this Court will consider any extension of the *privilege* of immunity beyond the strict requirements of law and international comity.

FOURTH POINT.

THE MOTIONS TO DISMISS OR AFFIRM.

The Court's attention is again directed to the fact that in all five of the cases, motions to Dismiss or Affirm were presented to this court on May 1, 1922.

Thereafter the court postponed the consideration of the said motions until the final argument of the appeals.

All of the matters which have been discussed heretofore in this brief amplify the grounds set forth in the moving papers as the basis for the motions to Dismiss or Affirm.

LAST POINT.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED, OR THE ORDERS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfuly submitted,

JOHN M. WOOLSEY,
ROBERT S. ERSKINE,
Counsel for Maxwell Rose.

OCT 3
WM. R. ST

Supreme Court of the United States

October Term, 1922.

Nos. 279, 280, 281, 282 and 283.

TIETJEN & LANG DRY DOCK COMPANY,
Libellant-Appellee,
against
THE STEAMSHIP "SAO VICENTE," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,
against
The Steamship "MORMUGAO," her engines, etc., Transportes Maritimos do Estado,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

THOMAS De SIMONE,
Libellant-Appellee,
against
The Steamship "MORMUGAO," her engines, etc., Transportes Maritimos do Estado,
Claimant-Appellant.

THOMAS De SIMONE,
Libellant-Appellee,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

REPLY BRIEF FOR THE CLAIMANT AND RESPONDENT-APPELLANT.

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Supreme Court of the United States

October Term, 1922.

TIETJEN & LANG DRY DOCK COMPANY,
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STEAMSHIP "SAO VICENTE," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant. 279

MAXWELL ROSE, doing business under the trade names and styles of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee, 280

against

STEAMSHIP "MORMUGAO," her engines, etc.,
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Respondent-Appellant.

THOMAS DE SIMONE,
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against

STEAMSHIP "MORMUGAO," her engines, etc.,
Claimant-Appellant. 282

THOMAS DE SIMONE,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant. 283

REPLY BRIEF FOR APPELLANT.

Facts.

In the Tietjen & Lang Dry Dock Company case the libel was filed on April 14th, 1921, for materials, supplies and services alleged to have been furnished to one of the appellant's ships (Record, pages 1, 2). This ship was owned by the Republic of Portugal and operated by the Transportes Maritimos do Estado, a department of that sovereign government (Record, page 3). The vessel was arrested by the United States Marshal, and thereafter the Portuguese Vice-Counsul General filed a claim of ownership on behalf of the Portuguese Government and a bond for the release of the ship (Record, page 14), and thereafter an answer was filed to the libel setting up the fact that the ship was the property of the Portuguese government, engaged in the public service of that government and objecting to the jurisdiction of the United States District Court (Record, page 3). The libellant filed exceptions to this answer alleging that it did not state facts sufficient to constitute a defense and that by appearing and answering the libel the Portuguese government had waived its immunity and objections to the jurisdiction of the Court (Record, page 5). These objections were sustained (Record, page 5) and a final decree was entered in favor of the libellant (Record, page 11).

The facts were practically the same in the other cases. Maxwell Rose instituted two actions, one in rem against the "Mormugao" (Record, pages 44 & 45) and the other in personam with a clause of foreign attachment against the Transportes Maritimos do Estado for services and wharfage to the "Cunene." Both vessels were

owned and operated by the Portuguese government (Record, pages 47, 108). The "Mormugao" was arrested in the in rem action and in both actions stipulations for value were filed. Answers were filed in both actions as in the Tietjen & Lang case (Record, pages 107, 162). The same exceptions to these answers were filed and sustained (Record, pages 48, 109) and final decrees were entered in favor of these libellants (Record, pages 86, 142).

Thomas DeSimone also instituted two actions as did Maxwell Rose, one in rem and the other in personam with a clause of foreign attachment (Record, pages 179-212). Libels were filed and process being waived stipulations for value were filed (Record, pages 179-212), and answers were filed in both cases setting up the same defenses as in the preceding cases (Record, pages 162, 195). Exceptions were also filed to these answers and upon the argument of these exceptions, Manton, J., overruled them, holding that the Portuguese government did not waive the jurisdictional question by its appearances and answers. These two cases were thereafter tried together (Record, pages 164, 198) and at the close of the trial, Manton, J. reversed himself and sustained the exceptions, holding that having appeared and answered, the appellant could not avail itself of its defense of sovereignty (Record, pages 210, 211). Final decrees were thereafter entered in favor of the libellants (Record, pages 176, 211).

From all of these decrees appeals were taken to the United States Circuit Court of Appeals, which affirmed all of the decrees of the District Court. (Record, pages 12, 56, 89, 96, 145, 151, 176, 185, 214, 220.)

From the foregoing it will be observed that there are two questions upon these appeals.

1. The sovereignty of the appellant and its immunity from the jurisidiction of the United States Courts.
2. Whether the appellant waived its immunity and right to object to the jurisdiction of the Courts of the United States.

POINT I.

Exhibit 1 was submitted with appellant's brief for the information of the Court.

The sovereignty and immunity of the appellant are matters of which this Court should take judicial notice. It can take judicial notice of the fact that the Transportes Maritimos do Estado is a sovereign part of the Portuguese national government to prevent an improper exercise of jurisdiction by our courts just as it would be expected that any foreign court would take judicial notice of the fact that the United States Navy Department was a part of our government. To this end it does not require evidence. It is entitled to access to any and all records or information from any source. This Exhibit 1, although it is a return upon a commission in another case now pending in the United States District Court, contains statements of the Director General of the Transportes Maritimos do Estado in Portugal, who certainly is competent to state just what the status of this department is with relation to his government, and it is respectfully submitted that this Court is entitled, if it wishes it, to know what

this status is on this authority in order to prevent a miscarriage of justice or an improper assumption of jurisdiction. It was with this in view that Exhibit 1 was submitted and attached to the brief herein and not with any intent to inject improperly any evidence into this case. If in the opinion of the Court this Exhibit is improperly submitted on this appeal, the appellant will be pleased to withdraw it. The appellant's case does not in any way rest or depend upon this exhibit. As is shown in the Record (pages 34, 47, 108, 163, 196) there is abundant to show that the Transportes Maritimos do Estado is in fact a sovereign department of Portugal (pages 5, 48, 109, 187-8, 222-3, 205-6, 209-10) and in fact the libellants have one and all admitted this fact by their exceptions to the appellant's defenses in its answers, and relying upon the decisions of the lower courts on these exceptions in all of the cases, and in the third case also on the refusal of the court to accept evidence on this question on the grounds asserted by the libellant in his exceptions to the answer (pages 209-10), and also in the testimony of libellant that he knew of the sovereign ownership of these vessels (Record, pages 205-6).

The commission was complete as it was received. The fact that certain cross interrogatories and answers were omitted (Exhibit 1, pages 22, 29) is because these interrogatories were stricken out of the commission by Augustus N. Hand, D. J., when issuing the commission. They are immaterial as they had no bearing on this question of sovereignty. The translator was agreed upon by stipulation of counsel in that case after advice that the services of the court interpreter were not available (Exhibit 1, page 33).

REPLY TO BRIEF OF APPELLEE TIETJEN AND LANG DRYDOCK CO.

POINT II.

The arguments in the statement of facts in the brief of the Tietjen and Lang Drydock Co. are all aside from the question at issue.

The ships were owned and operated by the sovereign government of Portugal and that government and its property were not subject to the jurisdiction of our Court. It makes no difference who ordered the repairs (Appellee's Brief, page 4) or when or how the claim to immunity was raised (Appellee's Brief, pages 10, 11). The want of jurisdiction may be raised at any stage of the action. It is sufficient if the actions are against a sovereign or its property. Then the Court should take judicial notice of this fact and direct the dismissal of the libels.

POINT III.

The jurisdictional question in these cases is reviewable by this Court.

The argument in appellee Tietjen & Lang Dry Dock Company's brief (page 12) that there is jurisdiction of the subject matter, is beside the point. The appellant admits that a sovereign may subject itself to jurisdiction but it must be and is conceded that there can be no jurisdiction of sovereign property, which is the subject matter of these actions

without the sovereign's consent, and there was no such consent in these cases. These cases here cited by appellee, for this reason as well as for the reasons pointed out by Mr. Justice Page in DeSimone vs. Transportes Maritimos do Estado (200 N. Y. App. Div., 82; Appellant's Brief, pages 35, 36) do not support the appellee's contention. To give jurisdiction the sovereign must consent, not by any act of its representatives here, but by a sovereign act, as, in the case of a Republic, by a legislative act.

It was in fact held in Kingdom of Roumania vs. Guaranty Trust Co. (250 Fed., 341), that a voluntary appearance in our Courts by a foreign sovereign and its prosecuting an action therein, the invoking of their jurisdiction on its behalf, does not imply a consent to the prosecution in the same action of a counterclaim against it. Certainly a mere appearance and answer in a suit in which it is made a defendant in the first instance, cannot amount to the necessary consent to be sued, when in its answer it expressly objects to the jurisdiction of the Court.

This rule applies as well to suits against the property of a sovereign as to suits against the sovereign. So far as jurisdiction is concerned there is no difference between these actions.

> Stanley vs. Schwalby, 147 U. S., 508;
> United States vs. Lee, 106 U. S., 196;
> Hassard vs. Mexico, 45 App. Div., 623; 29 Misc., 511.

In Carr vs. United States, 98 U. S., 432, where it was claimed that the United States had waived its objection to jurisdiction, the Court said:

> "We consider it to be a fundamental principle that the government cannot be sued except by its own consent * * *." It is conceded in The Siren (7 Wall., 152) and in The Davis 10 (id. 15) that without an act of Congress no direct proceeding can be instituted against the government or its property.
>
> In some cases * * * it might not be apparent until after suit was brought that the possession attempted to be assailed was that of the government; but when this is apparent by the pleadings, or the proofs, the jurisdiction of the Court ought to cease."

The contention that the decrees herein are not reviewable because the appeal was not taken directly to this Court instead of by writ of certiorari from the Circuit Court of Appeals, is sufficiently and conclusively answered in appellant's brief (Point X, page 22). In the Carlo Poma, 255 U. S., 219, case cited by appellee it will also be noticed that this Court by its decision in effect sustained a decree denying jurisdiction. If on the other hand the decree of the lower Court had affirmed an improper exercise of jurisdiction then this Court under the decisions cited in appellant's brief (Point X, pages 25, 26) would doubtless in order to have prevented such improper assumption or exercise of jurisdiction, have taken judicial notice of the want of jurisdiction and directed the dismissal of the case. The Court can always review a decree which upholds jurisdiction of the Court where no jurisdiction in fact exists.

POINT IV.

The action was against the Portuguese Government.

The ships were owned by the Portuguese Government and not by a separate entity. The Transportes Maritimos do Estado was not as stated by the respondent (Brief, page 16) a separate entity. It was not like the Emergency Fleet Corporation, but rather like the State, War or Navy Department, or any other department of the Federal Government, none of which can be sued.

The statement on page 16 of this appellee's brief, that the allegations in the libels, that the Transportes Maritimos do Estado was a separate and a foreign corporation, are not denied, is not true. These allegations are both denied in the answers in the cases there mentioned (Record, pages 107, 196).

NO PROOF WAS SUBMITTED ON THE TRIAL IN THE DE SIMONE CASES UPON THIS POINT IN THE DISTRICT COURT, BECAUSE THE JUDGE REFUSED TO RECEIVE IT (pages 209, 210).

It is difficult to understand how this appellee could cite the Luigi case, 230 Fed., 493, except from a misunderstanding of the case or an attempt to distort its finding or befog the issue (Respondent Tietjen & Lang Dry Dock Company's Brief, page 17). This *appellant filed a bond* of the American Surety Company giving its own property as security to that company for the bond to release its ves-

sel, and thus in effect substituted other property of its own in place of the vessel to the peril of the action, whereas in the Luigi case as we have pointed out (Brief, page 21), the vessel was *privately* owned, held under requisition by the sovereign and the *private* owner filed the bond and the Court allowed the attachment to stand only on the ground that as the private owner had intervened the sovereign rights could not be affected. This case is therefore not at all in point as cited by the appellee. In this case to permit these decrees to stand on such a ground as here claimed by this appellee, would merely amount to a sanctioning of a roundabout method of forcing a sovereign to submit itself to the jurisdiction of our courts by attaching its property, which it has been distinctly held cannot be done (Appellant's Brief, page 15, and cases cited).

POINT V.

The District Court never had jurisdiction of this appellant or any of its ships.

This appellee's argument in its Point III can readily be answered.

1. This appellant did not submit itself or its property to the adjudication of our courts. It objected to that adjudication (Record, pages 162, 195). The ships in these cases *were public property* in the *actual* possession of the sovereign, and the sovereign in these cases came in and asserted

its ownership and objection to jurisdiction, and therefore the Court should not have assumed jurisdiction over it or its property without its consent and in spite of its ownership and sovereignty.

2. Abundant authority is given in appellant's brief (Point IV) and supra (Point IV) to show how a sovereign's consent to jurisdiction must be given and that it cannot be implied as in the case of non-resident corporations as alleged by this appellee (Brief, page 18).

3. This appellant did not come into court as a private citizen or claim the ships in the name of a private entity as alleged by this respondent in his brief (page 19). It came in as the Transportes Maritimos do Estado, a department of the sovereign government of Portugal, and filed a bond by its Consul-General in his official capacity to release its property as stated above, and then in its answer so verified by its Consul General, as it had a perfect right to do, set up its immunity and objections to jurisdiction (Appellant's Brief, page 12, and cases cited). At no time did it consent to the jurisdiction of the Court and there could be no implied waiver of its objection to that jurisdiction as we have conclusively shown (Appellant's Brief, Point IV, page 13). If the objection was not raised before the answer, that does not affect the case as this objection can be first raised at any time, even on appeal to this Court.

4. The Luigi case cited is not, as we have shown in point. In the "Ucayali" case, 159 Fed., 800, and Jones vs. Andrews, 10 Wall., 327, there is no ques-

tion of sovereign immunity involved and these cases are therefore not at all in point here. Clark vs. Barnard, 108 U. S., 436, Gunter vs. Atlantic Coast Line, 200 U. S., 273, Porto Rico vs. Ramos, 232 U. S., 637, and Richardson vs. Fajardo Sugar Co., 241 U. S., 44, cited by this appellee, have no real bearing upon the issues involved in the cases on this appeal, and they are ably distinguished by Mr. Justice Page in his opinion in DeSimone vs. Transportes Maritimos do Estados (200 N. Y. App. Div., 82, Appendix B, Appellant's Brief, page 33).

5. The "Lake Monroe," 250 U. S., 246, cannot possibly be regarded as having any bearing on this appeal. It does not support the proposition to which it is cited, and moreover the decision turns upon a specific Act of Congress under which vessels *purchased, chartered or leased* from the United States should under certain conditions be subject to all the laws, regulations and liabilities governing merchant vessels. Certainly this Act has no bearing upon the appellant's ships and this case has no bearing upon any of the issues on this appeal. The "Pesaro," 255 U. S., 216, The Carlo Poma, 255 U. S., 219, and Ex parte Muir, 254 U. S., 522, are not in support of the proposition to which they are cited. Two of these cases are discussed by Mr. Justice Page in DeSimone vs. Transportes Maritimos do Estado (supra, Appellant's Brief, pages 42, 43). In any event there has been advanced no answer to the indisputable fact that this question of jurisdiction and the status of the appellant is one which this Court may take judicial notice and so decide as to prevent the exercise of jurisdiction where no jurisdiction exists.

6. The case of U. S. vs. Thompson, 66 U. S. (Lawyer's Ed.), 185, is rather in support of the appellant's contention that the sovereign cannot be sued without its consent and that its immunity extends to its property. It does not hold that the immunity exists only so long as the vessel is used for national objects, but in these cases the vessel was owned by the sovereign and used for sovereign purposes. It makes no difference what the sovereign purpose was. Our courts cannot say to a sovereign that it may use its property for one purpose and not for another; they cannot determine for what purpose the foreign sovereign may use its ships. As held in many cases the immunity of the sovereign vessel is not affected by its use (Appellant's Brief, page 10).

It is admitted that the appearances in these cases were general but the appearance was accompanied by an answer which set up the appellant's immunity and objection to jurisdiction and therefore cannot be regarded as a consent to submit to that jurisdiction to which it objected (Appellant's Brief, pages 10, 16). If it is true jurisdiction once acquired will be maintained, in our cases jurisdiction was never acquired, as the appelant was sovereign and never consented, but always objected to that jurisdiction. The case of United States vs. New York and Oriental S. S. Co., Limited, 216 Fed., 61, 63, holds that the sovereign, in this case the United States, cannot be sued without its consent and that its consent to be sued must be evidenced by an Act of Congress and cites Stanley vs. Schwalby, 162 U. S., 255, and further it holds that government officers cannot waive the government's privilege in this respect and that their consent that

such a suit should be brought cannot bind the Government of the United States (Carr vs. United States, 98 U. S., 432). This is this appellant's contention. In our cases certainly it is not claimed that there was such consent to these suits as an Act of Congress.

The entire brief of this appellee seems to be illogical and aside from the issues involved and to contain only arguments having no real bearing upon the facts and the citation of cases either not in point, or many of which are distinctly in support of appellant's contentions.

REPLY TO BRIEF OF APPELLEE ROSE.

POINT VI.

The argument in the Statement of Facts of the appellee Rose is immaterial and in some respects false.

1. It is here again stated that the Transportes Maritimos do Estado is a foreign corporation (page 4). This is untrue. It was denied in appellant's answers. It was not proven by the libellant and in fact it was admitted by his exceptions to the defense in the answers that it was a part of a sovereign government.

2. The statement that the jurisdiction of the courts and the writs were not challenged is untrue. They were challenged in the answer and this is one of the main questions in these cases.

3. How,—in the face of the decisions of this Court cited in appellant's brief showing that the filing of bonds, appearances and answers as in these cases can confer on the Court no jurisdiction over a sovereign where none could exist without its consent signified by a distinct sovereign act,—it can be claimed by this appellee, who, it is presumed knows the law, that jurisdiction can be acquired by any of the acts or procedure mentioned in the appellant's brief, it is difficult to understand. In these cases the bonds were signed in the name of the appellant by a consular officer with the surety company as surety, so that it is clear that the property of the sovereign is substituted for its ships, and that, if this decree is affirmed it will be virtually permitting the Court to force the sovereign to submit to it by attaching its property, to acquire jurisdiction by an act which it had no jurisdiction to commit.

The remainder of the statements and arguments of the appellee (pages 6-10) are without weight, and it is not necessary to refer to them except to point out that there are two points raised in this appeal and not merely one; viz., the question of jurisdiction and waiver which are distinct.

POINT VII.

The District Court has no jurisdiction of the subject or of the person in these cases.

This fact we have shown above and clearly in our brief. The case of Cooper vs. Reynolds, 10 Wall., 308, does not support this appellee's claim (Appellee's Brief, page 11). We take no exception to the

quotation given. Here there was no question of sovereignty. In our cases the Court had no power over this appellant nor over the res or property and had no right to render the judgment because of the sovereignty of the appellant. The sovereign power which organized our Court could not confer any such authority as it had none itself over the appellant or its property. The appearances in these cases with a distinct protest and objection to jurisdiction which the decisions cited by appellant in its brief show, can properly be raised in the first instance in the answer. The power of the Court to render a decree or judgment in a particular case depends upon the nature and extent of the authority vested on it by law in regard to the subject matter of the cause. In these cases no authority was vested in the Court by law as the law itself had no such power over this sovereign appellant. In these cases are therefore none of the elements necessary to found the decree and it is wholly immaterial whether the claims were or were not admiralty claims.

It seems absurd to say (page 12) that the Court had jurisdiction over the person of this sovereign appellant and over its property, the disposition of which is the subject of these actions on the ground that stevedoring contracts are subjects of its maritime jurisdiction. Equally untenable is the argument that the jurisdiction of the Court was completed over the person of this sovereign appellant and its property by the filing of the claims and appearances and the answers, objecting to that jurisdiction (page 13) in the face of the decisions of this Court directly opposed to any such claims (Appellant's Brief, pages 10, 12, 13, 14).

A general appearance will confer jurisdiction on the Court only in cases where the Court would acquire jurisdiction by the proper service of its process. In our cases such service would not confer jurisdiction over this appellant.

There is no proof in these cases that the Consular officer had any authority to waive the appellant's immunity by reason of its sovereignty (page 14) and certainly where such immunity cannot be waived by any officer but only by a sovereign act of the sovereign itself, our court cannot acquire jurisdiction by a mere presumption (page 13) of its own that any agent had such power, and this being so it is not material whether the consular officer intended to appear, or file a bond or answer in these cases. The recourse to this kind of argument only serves to emphasize the weakness of the appellee's contention.

It will be readily seen by the quotation given (pages 15, 16) particularly at the close of the quotation (page 16) that the case of Workman vs. New York City, 179 U. S., 552, is strongly in support of this appellant, as it is a *foreign sovereign over whose person and property jurisdiction cannot be exerted.*

The case of Farrar & Brown vs. U. S., 3 Pet., 458 (page 16), does not help the appellee. In this case the question is the consent of a sovereign to the jurisdiction of its own court; not as in our case, an exercise of jurisdiction by our court over a foreign sovereign without its consent. In that case it is assumed that the appearance was without objection for the term. In our case the appearance was immediately followed by an answer specifically objecting to the jurisdiction of the Court. In any event this case was directly over-

ruled by this Court in this particular in Carr vs. United States, 98 U. S., 432, United States vs. Lee, 106 U. S., 196, and Stanley vs. Schwalby, 147 U. S., 508, where the Attorney General actually answered and the Court held that this act of the Attorney General could not constitute a voluntary submission of the United States to the jurisdiction of the Court and that in appearing and answering as far as binding the sovereign to consent to the jurisdiction of the Court it was in excess of his authority and to that extent unauthorized and a nullity. The other cases cited by this appellee on this point (pages 18, 19, 20) have already been discussed above and ably distinguished in DeSimone vs. Transportes Maritimos do Estado, 200 N. Y. App. Div., 82 (Appellant's Brief, Appendix B, page 35).

The appellant's statement, referred to on page 21 of this appellee's brief, is in effect that a voluntary appearance and/or an answer might waive objection to jurisdiction only in the cases mentioned and in this there is no fallacy. The statement that the "subject matter of the action is sovereign property" is in these cases correct. "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong" (United States vs. New York & O. S. S. Co., 216 Fed., 61, 66, citing Cooper vs. Reynolds, 10 Wall., 308). Cases of the general class to which the cases at bar belong are cases involving the rights of a sovereign and the sovereign's control of its property, the immunity of a sovereign and of sovereign property.

The remaining arguments in this appellant's First Point (pages 21, 22), rest upon the assumption of waiver of objection to the jurisdiction of the Court by the sovereign, but since, as we have

shown (Appellant's Brief, Points III and IV, pages 10, 16), that there was no such waiver these arguments fall.

POINT VIII.

The governmental ownership of the steamships of this appellant is established.

This ownership is admitted by the libellant's exceptions to the answers in these cases which operate as demurrers and thus for the purposes of these suits, admit the truth of the allegations to this effect in the answers (Record, pages 5, 48, 109). (The exceptions and orders overruling them were omitted from the printed record by error.)

If there is no other evidence in the record as to this ownership it is due to the fact that owing to the decree sustaining of these exceptions there were no trials in the first three cases (Record, pages 8, 52, 113), and in the DeSimone cases, the Court refused to receive evidence on this point (Record, pages 209, 210, 211, see Appellant's Brief, Point I, page 6).

The rest of the argument in this point has already been discussed above in answer to the brief of appellee Tietjen & Lang Dry Dock Co. It is moreover irrelevant for the sovereign in these cases properly relied upon its protest against and objection to the jurisdiction of the Court raised in its answers (Appellant's Brief, page 12) and its emphatic denial therein of consent to that jurisdiction. Under these circumstances it was unnecessary for it specifically to repudiate the filing of any documents or to take any other steps. The

fact is that the Court had no jurisdiction and of this, this Court can take judicial notice. It is fatal to these decrees.

The allegation in the appellee's brief (page 24) that "there was nothing set forth in the answers to show that the ownership of the department was in fact the ownership of the sovereign itself" is puerile. The answer states that the ship is owned and operated by the Transportes Maritimos do Estado and that the Transportes Maritimos do Estado is a department of the sovereign Government of Portugal (Record, pages 46, 107). It must follow that if the ship is owned by a department of the Sovereign Government, a part of that government, it is owned by that government. This is plain logic.

POINT IX.

The litigation has not been for delay.

The answer to this assertion in appellee's brief (page 26) is that it is not true (Affidavit in Opposition to Motion to Dismiss or Affirm, Art. XIV, page 10, Art. XVI, page 12).

Reply to Brief of Appellee De Simone.

POINT X.

As to the Facts.

The statement that there is no affirmative allegation in the answer in the action in personam that the appellant is not a foreign corporation is misleading. There is a direct allegation in the libel

that it is a foreign corporation and a positive denial of this averment in the answer (pages 162, 196). The answer also affirmatively states that it is a department of the Government of Portugal. It is not necessary in view of the denial and allegations to state affirmatively that it is not a foreign corporation.

The answer in the Tietjen and Lang Drydock Co. case states that the vessel was engaged in the *public* service of Portugal, and all the answers allege affirmatively that the vessels were owned and operated by the sovereign government of Portugal. In fact the vessels were all engaged in the *public* service of Portugal carrying supplies for the rehabilitation of the country after the war, supplies purchased by the government and carried in her own ships for this purpose. (Aff't of Geo. S. Duarte, in opposition to motion to affirm or deny.) The Consul General further states in his petition for the writs of certiorari herein that all of these vessels were the *public* property of the Government of Portugal (Petition, page 6).

POINT XI.

This appellee adds nothing of weight in support of the claim of waiver of jurisdiction in these cases.

There is nothing in the first point of this appellee's brief (pages 6 to 14) that has not been answered above and in appellant's brief. The cases cited can be readily distinguished as was shown by Justice Page in the De Simone case in the Appellate Division of the New York Supreme Court, supra, and in this appellant's brief.

As far as they are relevant they support the appellant's contentions on this appeal rather than those of this appellee. (Appellant's Brief, pages 21, 36, 37.) In Porto Rico vs. Ramos, 232 U. S., 627, the Attorney General of Porto Rico *asked leave to intervene and be made a party defendant.* The Court *granted the motion.* The People of Porto Rico then demurred on the ground of sovereign immunity and the Court held that if the suit had been originally against the People of Porto Rico it could have relied upon this immunity under Porto Rico vs. Rosaly, 227 U. S., 270.

The assertion on page 10 of this appellant's brief that if a foreign sovereign should appear and answer, presumably he wishes to be understood, as did this appellant, he may not withdraw without the consent of the Court, appears to be wilfully misleading. It is not the law. The cases cited by him to this proposition do not support such a statement. None of them touch upon this question of the effect of an appearance by a foreign sovereign. It is well settled law that a foreign sovereign cannot be sued in our Courts without its consent and that an objection to the exercise of jurisdiction may be raised at any stage of an action by the parties or by the Court itself (Appellant's Brief, pages 6, 10, and cases there cited). In Rhode Island vs. Massachusetts, 12 Peters, 657, cited by the appellee, the Court said at page 720 (italics ours):

> "When the objection goes to the power of the Court over the parties or the subject matter, the defendant need not, for he cannot give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in

> Court or equity, the ground of the objection is not taken by plea in abatement as an exception of the given case from the otherwise general jurisdiction of the Court; *appearance does not cure the defect of judicial power* and it may be *relied on by plea, answer, demurrer or at the trial or hearing* unless it goes to the manner of bringing the defendant into Court."

Therefore it was not necessary for this appellant to attempt to withdraw its appearance or answer. It could properly rely upon its answers and the defense of immunity and objection to jurisdiction which they contained. In fact it is a universally recognized principle that a foreign sovereign is entirely and completely immune from the process and jurisdiction of our Courts (Cases cited in Appellant's Brief, page 8). This includes judgments as well as other processes. It follows therefore that this objection can be first raised at any time including upon the appeal before this Court.

POINT XII.

This appellant did not waive immunity by engaging in commerce and trade.

In support of this proposition the "Maipo," 252 Fed., 627; 259 Fed., 367, is quite emphatic.

(a) In this case a naval transport of Chile carried a commercial cargo on a voyage here to obtain a cargo for the Chilean Government. Judge Mayer held that the vessel was immune although engaged

in a commercial enterprise. This case came before the same court a second time, and Judge Hough then said, to the same effect (259 Fed., 367):

> "Why was a war vessel exempt from seizure? Not because it was a war vessel but because it was a part of the exercise or manifestation of sovereign power. Why is any other vessel exempt? Why may any other piece of property be exempt? For the same reason, just as the sovereign himself is exempt. Now, it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic * * * goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person, but I think it must be plain that if I, in my official capacity, were to assert that view and enforce it, I would be assuming (in this case) as one of the humbler officers of the Government of the United States, to prescribe to the Republic of Chile what that republic should consider to be a governmental function. If the Republic of Chile considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chile; and if we do not approve of it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has hitherto been accorded to governmental property, then we must say so through diplomatic channels and not through the judiciary. Otherwise the judiciary are really contributing to what might become, under conceivable circumstances, a *casus belli*."

In other words, rights or claims as in the case at bar *are not the subject of jurisdiction of our courts but should be adjusted through diplomatic channels* between *the governments concerned,* that is, as Judge Hough said, the questions are *"not justiciable, but diplomatic."*

(b) In the *Carlo Poma,* 259 Fed., 369, also a recent case in this Circuit, the vessel was carrying a cargo of lemons and other merchandise for private persons under regular bills of lading and the Court, Ward, Circuit Judge, affirming the order staying the execution of process against the ship, delivering the opinion, said:

> "We are concerned in this case only with the property of a foreign sovereign. The appellant contends that a vessel of a foreign sovereign not being a war vessel or at the time performing public duties but engaged in carrying cargo commercially is not entitled to immunity from suit. The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge,* Law Reports 5, P. D. 197; *The Jassy* (1906), P. 270. The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time the process is served. *The Davis,* 10 Wall., 15, 19 L. Ed., 875;

> *Long* vs. *The Tampico* (D. C.), 16 Fed., 491; *The Attualita,* 238 Fed., 909, 152 C. C. A., 43. * * * It follows from these principles that the order appealed from was right. Similar conclusions have been reached by district judges in this circuit. Judge Veeder in the case of the *Pampa* (D. C.), 245 Fed., 137; Judge Mayer in the case of the *Maipo* (D. C.), 252 Fed., 627; and Judge Hough as to the same steamer, February 21, 1919."

In the Porto Alexandre, (1920) P., 30, Mr. Justice Hill set aside the writ in rem on his conclusion that the law as laid down in the *Parlement Belge* was that a sovereign state could not be sued either by being served in personam or indirectly by proceedings against its property and that therefore it mattered not how the property was being employed. It was here held that a vessel owned or requisitioned by a sovereign independent state and carrying freight for the state was not deprived of the privilege decreed by international comity of immunity from the process of arrest by reason of being employed in ordinary trading voyages, carrying cargoes for individuals. On appeal from this decision of Justice Hill, Lord Justice Scrutton held that there was no such distinction, and said:

> "These are matters to be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the principle of international courtesy which govern the relation between independent and sovereign states."

This ship in this case, the "Porto Alexandre," was precisely the same in status as the ships involved in the cases at bar. She was owned by the Government of Portugal, was owned and operated by the Transportes Maritimos do Estado, a department of said government, and was being operated as public property of the said government precisely as were the ships in these cases, and the case was dismissed on the ground of the immunity of the Government of Portugal and of its property. Here we have a direct adjudication on the facts in these appeals. All of these ships, the "Sao Vicente," "Mormugao," "Sao Antao" and "Cunene," were the public property of the sovereign Government of Portugal employed in its public service carrying cargo, goods and supplies consisting largely of coal and petroleum for the account and benefit of said government (Affidavit of George S. Duarte in opposition to Motion to Dismiss or Affirm).

The opinion of Mack, Circuit Judge, in the "Pesaro, 277 Fed., 473, quoted in this appellee's brief is an interesting discussion, but it does not appear to be helpful to this appellee for it really does not decide anything; no final decision is given or decree directed. The judge states that the vessel was an ordinary merchant vessel employed for commercial purposes and that for this reason she should not be entitled to immunity. Still he goes on and expressing a doubt, says, that if he is in error in this belief, the vessel is not entitled to immunity because she is subject to the processes of the Italian courts. Upon this fact his conclusion is based. It is nowhere shown or suggested in these cases to be true of the ships of this appellant that they were subject to the

processes of the courts of Portugal. This reasoning if followed to its logical end, leads to some very strange results. A government, it is conceded, may submit itself and its property to the jurisdiction of its own court. The Italian Government consents to submit its ships, its property to the jurisdiction of its own courts, thereby it consents by implication to submit its sovereign property to the jurisdiction of any foreign sovereign's court. If this doctrine be correct, it is as reasonable to apply it to the sovereignty and property of the United States. Therefore, by consenting to be sued and submitting its property to the jurisdiction of its own courts it would thereby submit its property to the jurisdiction of the court of any foreign sovereign, and to that extent yield its sovereignty or immunity. To this proposition we doubt if anyone would agree as to our Government. In any event, it will be seen that the opinion of Judge Mack does not apply in these cases and that it cannot be regarded as in any way a precedent. In many respects, however, as showing what the law is, it is in support of the contentions of the appellant, as, where he says, "The general principle of the immunity of a sovereign state from suit without its express consent, is too deeply imbedded in our law to be uprooted by judicial decision" and "conservative opinion (among European jurists) seems to favor the non-suability of foreign sovereign states in practically all cases" (The Pesaro, 277 Fed., 473, 474, 483; Brief of Appellant DeSimone, pages 30, 47). Judge Mack appears in these opinions to lean toward the denying of immunity because he seems to feel that it might be desirable in some cases to subject foreign ships to the jurisdiction of the

Court, unlike Judge Hough, who in the "Maipo" case, supra, though he thinks that in certain circumstances the sovereign should be subject to the court's jurisdiction still, upon the principles of law upholds the immunity of the sovereign and its property.

POINT XIII.

These causes should be remanded to the lower Court with a direction to dismiss the libels for want of jurisdiction.

1. The law is, as we have, we believe, conclusively shown, that neither a foreign sovereign nor its property can be subjected to the jurisdiction of the United States Courts without its consent. Such a consent cannot be implied or waived. It must be an express consent by a legislative act, such as, in the case of this Government, an Act of Congress. No such consent of this sovereign appellant has been suggested. This appellant is such a sovereign and its ships are sovereign property. In order that a Court may hear and determine a controversy it must have jurisdiction both of the person and of the subject matter (United States vs. New York & O. S. S. Co., 216 Fed., 61, 63; Cooper vs. Reynolds, 10 Wall., 308). In these actions the lower Courts had neither jurisdiction of the subject matter nor of the person; they have exceeded their jurisdiction or have assumed a jurisdiction which they never had or could have. Of these facts this Court can and should take judicial notice and to prevent such an excess or assumption of juris-

diction, remand these causes to the District Court with a direction to dismiss the libels in personam against this appellant and in personam against its property in rem.

2. Much has been said by the appellees as to the time and manner of bringing the sovereignty and immunity of appellant to the attention of the Court. It is wholly immaterial when or how the question is raised. If at any time it appears to this Court that the action is against a foreign sovereign or its sovereign property this Court may properly OF ITS OWN MOTION direct a dismissal of the action to prevent any improper exercise of jurisdiction.

Dated, New York City, Sept. 29th, 1922.

Respectfully submitted,

F. DUDLEY KOHLER,
Proctor for Claimant and
Respondent-Appellant,
25 Broadway,
New York City.

THE SAO VICENTE.[1]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 279–283. Argued October 3, 1922.—Decided November 13, 1922.

A consul general is not competent, merely by virtue of his office, to appear and claim immunity on behalf of his government and its property, in admiralty proceedings. P. 154.

Certiorari to review 281 Fed. 111, and 115, dismissed.

THESE were writs of certiorari, issued upon petition of the Consul General of Portugal, for the purpose of bringing up admiralty proceedings described in the opinion. The writs were directed to decrees of the Circuit Court

[1] The docket titles of these cases are: No. 279, *Transportes Maritimos do Estado, Claimant of S. S. "Sao Vicente,"* v. *Tietjen & Lang Drydock Company.* No. 280, *Transportes Maritimos do Estado, Claimant of S. S. "Murmugao,"* v. *Maxwell Rose, doing business as Battery Operating Company and Whitehall Stevedoring Company.* No. 281, *Transportes Maritimos do Estado, (in personam,)* v. *Maxwell Rose, doing business as Battery Operating Company and Whitehall Stevedoring Company.* No. 282, *Transportes Maritimos do Estado, Claimant of S. S. "Murmugao",* v. *Thomas De Simone.* No. 283, *Transportes Maritimos do Estado, (in personam,)* v. *Thomas De Simone.*

of Appeals which dismissed for want of jurisdiction appeals from the decrees of the District Court.

Mr. F. Dudley Kohler for petitioner.

The São Vicente and Murmugao were owned and operated by the independent sovereign Government of Portugal and they and their owner were immune from suit in the United States court.

The immunity of the petitioner's vessels is not affected by the fact that they carried commercial cargo. *The Pampa*, 245 Fed. 137; *The Carlo Poma*, 259 Fed. 369; *The Maipo*, 252 Fed. 627; 259 Fed. 367; *Briggs* v. *Light Ships*, 11 Allen, 157; *The Parlement Belge*, L. R. 5 P. D. 197; *The Porto Alexandre* [1920] P. D. 30; *The Scotia* [1903] A. C. 501; *The Jassy* [1906] P. D. 270; *The Constitution*, L. R. 4 P. D. 39.

The petitioner did not waive its rights to immunity or its objections to the jurisdiction of the United States courts.

There can be no implied waiver of objection to the jurisdiction of our courts by a sovereign.

The filing of bonds or stipulations in these cases cannot be regarded as a waiver of objection to jurisdiction of our courts.

The decisions of the District Court and the Circuit Court of Appeals in these actions are and permit a positive violation of the sovereignty of an independent foreign sovereign Government with which the United States is at peace; and are in conflict with the decisions of this Court and with the general principles of the law as laid down by the federal courts.

The procedure by appeals to the Court of Appeals and then by writ of certiorari was proper practice and the petitioner is properly before the Court.

Mr. John M. Woolsey, *Mr. E. Curtis Rouse* and *Mr. Meyer Kraushaar*, with whom *Mr. Robert S. Erskine*, *Mr.*

J. Dexter Crowell and *Mr. Emanuel Celler* were on the briefs, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The above entitled causes are here on writs of certiorari, issued upon the sole petition of George S. Duarte, who described himself therein as the duly accredited Consul General of the Republic of Portugal in the United States of America, without more. The petition sets out the proceedings below; declares, "The Portuguese Government does not intend to avoid its just obligations to citizens of the United States, but it claims that if there is any question between it and such citizens they are matters for adjudication by the Diplomatic Departments of the two Governments and it does object to the violation of its sovereignty contrary to all rules of international law and international comity;" and alleges, as one reason for granting the writ, that "an important question of international law and comity is involved." There is nothing to show that the Consul General had authority or right to take any action concerning the matters in question, except as may be inferred from his official position. Considering the possible international aspect of the controversy, we granted the petition, and appropriate writs issued. Counsel have been heard, both orally and by briefs.

Nos. 279, 280 and 282 are separate proceedings *in rem*, commenced in the United States District Court, Southern District of New York, against The Sao Vicente and The Murmugao, to recover for materials, supplies, work and labor furnished to them. In each cause, after arrest of the steamer, the Transportes Maritimos do Estado, intervening for its interest, appeared before the court and made claim, averring that it was in possession when the process issued, and was the true and *bona fide* owner. It asked

to defend accordingly; gave bond for costs and value; and secured the vessel's discharge. Thereafter, the steamer answered denying the allegations of the libel, and as a distinct and complete defense alleged that it was owned and operated by the Transportes Maritimos do Estado, a Department of the Government of Portugal not subject to suits in courts of the United States. This special defense was declared insufficient and final decrees were duly entered. Appeals to the Circuit Court of Appeals were dismissed (*The Carlo Poma*, 255 U. S. 219), that court being of opinion that the only controverted point was the jurisdiction of the trial court. 281 Fed. 111 and 115.

Nos. 281 and 283 are separate proceedings *in personam*, commenced in the same District Court against Transportes Maritimos do Estado, alleged to be a foreign corporation organized under the laws of the Republic of Portugal, to recover for services, goods, wares and merchandise furnished to its steamers The Cunene and The Santo Antao. The Murmugao was attached. The respondents answered, made general denials, and, as a distinct and complete defense, alleged The Cunene and The Santo Antao were owned and operated by a Department of the sovereign Government of Portugal, and that the court was therefore without jurisdiction. This defense was held insufficient. Appeals to the Circuit Court of Appeals were dismissed upon the view that they involved only the question of jurisdiction.

We are of the opinion that the writs of certiorari were improvidently awarded and must be dismissed. The Consul General was not party to any of the proceedings below, and is not competent, merely by virtue of his office, to appear here for his Government and claim immunity from process in the manner attempted. In *The Anne*, 3 Wheat. 435, 445, a prize proceeding for condemnation, a claim was interposed in behalf of the Spanish Consul, for restitution of the vessel because of asserted violation of the

neutral territory of Spain. Speaking through Mr. Justice Story, this Court said:

"And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed."

And see *United States* v. *Wong Kim Ark*, 169 U. S. 649, 678; *In re Baiz*, 135 U. S. 403, 424; *Ex parte Muir*, 254 U. S. 522, 532; *The Pesaro*, 255 U. S. 216, 218.

Dismissed.